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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~227~~ 64

THE CHICAGO RAILWAY EQUIPMENT COMPANY, PLAINTIFF IN ERROR,

vs.

THE MERCHANTS NATIONAL BANK OF CHICAGO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED AUGUST 28, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 327.

THE CHICAGO RAILWAY EQUIPMENT COMPANY, PLAINTIFF IN ERROR,

vs.

THE MERCHANTS NATIONAL BANK OF CHICAGO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

INDEX.

	Original.	Print.
Writ of error	1	1
Return on writ of error	2	1
Caption	3	2
Præcipe for summons	3	2
Summons	4	2
Complaint	5	3
Marshal's return on summons	10	6
Answer	11	6
Amended answer	15	8
Trial and verdict	19	10
Order for stay	20	11
Motion for new trial	20	11
Bill of exceptions	22	11
Testimony of J. C. O. Gorman	22	12
Amendments to pleadings allowed	23	12
Testimony of J. C. O. Gorman (recalled)	24	13
Chauncy J. Blair	26	14
E. D. Buffington	29	15
J. C. O. Gorman (for defense)	30	16
Motion for verdict for defendant	31	16
Testimony of J. C. O. Gorman (recalled for defense)	31	17
Defendant's offer of testimony	33	17
Testimony of Chauncy J. Blair (recalled)	34	18

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	Original.	Print.
Exhibit A—Articles of organization of defendant	36	19
B—Promissory note of Jan. 20, 1884	41	21
C— " " Jan. 23, 1884	42	22
Order fixing time for hearing on motion for new trial, &c.	43	22
Order overruling motion for new trial	44	23
Judgment	44	23
Second bill of exceptions	45	23
Reasons for new trial	45	23
Bond on writ of error	47	24
Citation	49	25
Proof of service of citation	50	25
Clerk's certificate	51	26

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the western district of Wisconsin, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The Merchants' National Bank of Chicago and The Chicago Railway Equipment Company, a manifest error hath happened, to the great damage of the said Chicago Railway Equipment Company, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, on the 24th day of June, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal U. S. District Court, Western Dist. of Wisconsin.]

F. M. STEWART,
Clerk of the Circuit Court of the United States
for the Western District of Wisconsin.

GREENLEAF CLARK,
I. C. SLOAN, AND
PINNEY & SANBORN,
Attorneys for Plaintiff in Error.

Allowed by me—
——— ———.

2 [Endorsed:] Circuit court United States, western district of Wisc. Merchants' National Bank of Chicago *vs.* Chicago Railway Equipment Company. Writ of error. Filed June 24, 1886. F. M. Stewart, cl'k.

The return of the within writ appears by the schedule hereto annexed.

The return of the judges of the circuit court of the United States for the western district of Wisconsin.

In testimony whereof I have hereunto set my hand and affixed

the seal of said circuit court, at my office, in Madison, this 24th day of June, A. D. 1886, and of our Independence the 111th year.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin.]

F. M. STEWART, *Clerk.*

3 UNITED STATES OF AMERICA, *Western District of Wisconsin,* } ss:

At a special term of the circuit court of the United States of America for the western district of Wisconsin, begun and held, according to law, at the city of Madison, in said district, on the first Tuesday (being the 1st day) of December, A. D. 1885—present and presiding, the Honorable Romanzo Burn, judge—among other the following proceedings were had, to wit:

THE MERCHANTS' NATIONAL BANK OF CHICAGO, Plaintiff,
vs.
THE CHICAGO RAILWAY EQUIPMENT COMPANY, Defendant. } At Law.

Be it remembered that heretofore, to wit, on the 19th day of November, A. D. 1884, came the above-named plaintiff, by its attorney, Gregory & Gregory, and filed its præcipe for a summons against the above-named defendant as follows, to wit:

United States Circuit Court, Western District of Wisconsin.

THE MERCHANTS' NATIONAL BANK OF CHICAGO
vs.
THE CHICAGO RAILWAY EQUIPMENT COMPANY.

The clerk of said court will please issue a summons in this action above entitled—complaint to be served.

Dated Nov. 19, 1884.

GREGORY & GREGORY,
Pl'ff's Att'ys.

4 Whereupon summons issued as follows, to wit:

Summons.

Circuit Court of the United States for the Western District of Wisconsin.

THE MERCHANTS' NATIONAL BANK OF CHICAGO, Plaintiff,
vs.
THE CHICAGO RAILWAY EQUIPMENT COMPANY, Defendant.

The President of the United States of America to the said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend

the above-entitled action in the court aforesaid; and in case of your failure so to do judgment will be rendered against you, according to the demand of the complaint which is filed in the office of the clerk of this court, at Madison, Wisconsin, and a copy of which is herewith served upon you; and you are also required to file your answer in said action in the office of the clerk of this court, at the city of Madison, within the time above specified.

The marshal of said district is hereby commanded to serve this summons and make due return thereto.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Madison, in the said western district of Wisconsin, this 19th day of November, in the year of our Lord one thousand eight hundred and
5 eighty-four, and of the Independence of the United States the one hundred and ninth.

[SEAL.] F. M. STEWART, *Clerk.*

GREGORY & GREGORY,
Plaintiff's Attorney-, Madison, Wis.

And on same day, to wit, November 19, 1884, came the said plaintiff and filed its complaint as follows, to wit:

Complaint.

Circuit Court of the United States for the Western District of Wisconsin.

THE MERCHANTS' NATIONAL BANK OF CHICAGO
vs.
THE CHICAGO RAILWAY EQUIPMENT COMPANY.

The complaint of the Merchants' National Bank of Chicago, Illinois, by Gregory & Gregory, its attorneys, respectfully represents that it is a corporation and banking association duly organized and existing under and by virtue of the laws of the United States of America providing for national banking associations, and that it has its place of business and does business at the city of Chicago, in the State of Illinois, and is and at the dates hereinafter mentioned was a citizen and *and* resident of said State of Illinois.

That the Chicago Railway Equipment Company is and at the date hereinafter mentioned was a corporation organized and existing under and by virtue of the law of the State of Wisconsin
6 and a resident and citizen of said State and said district.

That the Northwestern Manufacturing and Car Company is and at the date hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Minnesota, having its principal place of business at Stillwater, in said State, and is and at said dates was a citizen and resident of said State of Minnesota.

And for a first cause of action said plaintiff alleges that on the twentieth day of January, 1884, said Chicago Railway Equipment Company duly made, executed, and delivered to said Northwestern Manufacturing and Car Company its certain promissory note, in writing, bearing date on said last-named day, wherein and whereby said Chicago Railway Equipment Company promised to pay to the order of the said Northwestern Manufacturing and Car Company four months after the date thereof five thousand dollars at the First National Bank of Chicago, Illinois, for value received; which said note is in the following words and figures, to wit:

$5,000. CHICAGO, ILL., *January* 20, *A. D.* 1884.

For value received, four months after date, the Chicago Railway Equipment Company promise to pay to the order of the Northwestern Manufacturing and Car Company of Stillwater, Minnesota, five thousand dollars, at First Nat. Bank of Chicago, Illinois, with interest thereon, at the rate — per cent. per annum, from date until paid.

7 This note is one of a series of twenty-five notes, of even date herewith, of the sum of five thousand dollars each, and shall become due and payable to the holder on the failure of the maker to pay the principal and interest of any one of the notes of said series, and all of said notes are given for the purchase price of two hundred — fifty railway freight cars manufactured by the payee hereof and sold by said payee to the maker hereof, which cars are numbered from 13000 to 13249, inclusive, and marked on the side thereof with the words and letters Blue Line C. & E. I. R. R. Co.; and it is agreed by the maker hereof that the title to said cars shall remain in the said payee until all the notes of said series, both principal and interest, are fully paid, all of said notes being equally and rateably secured on said cars.

No. 1.

GEO. B. BURROWS,
Vice-President.

Countersigned by—
E. D. BUFFINGTON, *Treas.*

Endorsed: Northwestern M'f'g Car Co., per J. C. Gorman, treas.

That thereafter and prior to its maturity said note was duly sold and delivered for value and endorsed in blank by said Northwestern Manufacturing and Car Company to the said plaintiff, and that said plaintiff still holds and owns the same.

That said note was duly presented for payment at said First National Bank on the 22d day of May, 1884, and that no part thereof was paid, and the same was thereupon duly protested for nonpayment, and that the fees & charges & expenses of such protest were $2.36.

8 That said note is due and payable, and no part thereof has been paid.

And for a second cause of action said plaintiff alleges that thereafter and on the twenty-third day of January, 1884, said Chicago Railway Equipment Company made, executed, and delivered to said Northwestern Manufacturing and Car Company its certain other promissory note, in writing, bearing date on said last-mentioned day, wherein and whereby, for value received, it promised to pay, four months after the date thereof, to the said Northwestern Manufacturing and Car Company five thousand dollars at the First National Bank of Chicago, Illinois; that thereafter and prior to the maturity of said note the same was duly sold, transferred, and endorsed in blank by said Northwestern Manufacturing and Car Company to said plaintiff for value, and the same ever since has been and now is held and owned by said plaintiff; which said note is in the following words & figures:

$5,000.00. CHICAGO, ILL., *Jan'y* 23, *A. D.* 1884.

For value received, four months after date, the Chicago Railway Equipment Company promise to pay to the order of the "Northwestern Manufacturing and Car Company" of Stillwater, Minnesota, five thousand dollars, at First National Bank of Chicago, Illinois, with interest thereon at the rate of — per cent. per annum from date until paid. This note is one of a series of twenty-five notes, of even date herewith, of the sum of five thousand dollars cash, and shall become due and payable to the holder on the failure of the
9 maker to pay the principal or interest of any one of said series, and all of said notes are given for the purchase price of two hundred & fifty railway freight cars manufactured by the payee thereof and sold by said payee to the maker hereof, which cars are numbered from 13000 to 13249, inclusive, and marked on the side thereof with the words and letters "Blue Line C. & I. R. R. Co.," and it is agreed by the maker hereof that the title to said cars shall remain in the said payee until all the notes of said series, with principal and interest, are fully paid, all of said notes being equally — rateably secured on said cars.

GEO. B. BURROWS,
Vice-President.

Countersigned by—
E. D. BUFFINGTON, *Treas.*

Endorsed: Northwestern M'f'g Car Co., per J. C. Gorman, treas.

That on the 26th day of May, 1884, said note was duly presented at the First National Bank of Chicago, Illinois, and that no part thereof was paid, and that the same was thereupon duly protested for non-payment, and that the costs and fees of such protest ammounts to the sum of $2.31; that said — is due and payable, but that no part thereof has been paid.

Wherefore said plaintiff askes judgment against said defendant for the sum of ten thousand and four dollars and sixty-two cents, together with interest at the rate of six per cent. per annum from the 23d day of May, 1884, upon the sum of — thousand dollars,

and with interest at said rate on the further sum of five thousand dollars from the 26 day of May, 1884, and for its costs in this action.

10 GREGORY & GREGORY,
Pl'ff's Att'ys.

WESTERN DISTRICT OF WISCONSIN, *ss:*

Charles N. Gregory, being first duly sworn, says that he is a member of the law firm of Gregory & Gregory, attorneys for the plaintiff in the above-entitled action; that he has read the foregoing complaint by them subscribed and knows the contents thereof and verily believes the same to be true; that the reason this verification is made by this deponent and not by said plaintiff or any officer thereof is that neither of said plaintiffs nor any officer thereof, of said plaintiff corporation, lives or is now within the county of Dunn or State of Wisconsin, in which county and State said attorneys reside, and that said causes of action set out in said complaint are founded upon written instruments for the payment of money only, and that said instruments are in the possession of said defendant as such attorneys; that the grounds of defendants' belief are *that* the said instruments and the certificates of protest thereto attached and the statement of John Morris, Esq., of Chicago, Illinois, the agent and attorney of said plaintiff, made to deponent of the facts set out in said complaint.

CHARLES N. GREGORY.

Subscribed and sworn to before me November 19, 1884.
F. M. STEWART, *Clerk.*

Marshal's Return on Summons.

11 Summons returned. Served on the within-named The Chicago Railway Equipment Company by delivering to Geo. B. Burrows personally, the vice-president of said company, a copy of this summons and complaint November 19, 1884.
F. W. OAKLEY, *Marshal,*
By W. S. MAIN, *Deputy.*

And on this day, to wit, the 16th day of December, A. D. 1884, said defendant, by its attorneys, filed in said clerk's office its answer in said entitled cause as follows, to wit:

Circuit Court of the United States for the Western District of Wisconsin.

THE MERCHANTS' NATIONAL BANK OF CHICAGO, ILLINOIS, Pl'ff,
vs.
THE CHICAGO RAILWAY EQUIPMENT COMPANY.

The above-named defendant, answering the complaint of the above-named plaintiff in this action, denies that on the 20th day of Janu-

ary, 1884, or at any other time, the said defendant made, executed, or delivered the promissory note in writing mentioned and described in the first cause of action stated in the said complaint; and further denies that a valuable consideration or any consideration was paid to or received by the said defendant for making, executing, or delivering the said pretended note mentioned and described
12 in said first cause of action and alleged therein to be a promissory note; and, upon information and belief, further denies that said pretended promissory note mentioned and described in said first cause of action is a promissory note or purports to be made by the said defendant; and further denies that the said defendant, for value received or otherwise, delivered the said paper mentioned and described in said first cause of action to the Northwestern Manufacturing and Car Company or any other corporation or person.

And the said defendant, further answering said complaint, showand alleges that it has no knowledge or information sufficient to form a belief as to whether thereafter and prior to the maturity or at any other time the said pretended note was sold or delivered, for value or otherwise, or was endorsed in blank or otherwise by said Northwestern Manufacturing & Car Company to the said plaintiff, or whether the said plaintiff holds or owns the same, or whether the said note was duly or otherwise presented for payment at the First National Bank of Chicago, Illinois, on the 23d day of May, 1884, or at any other time, or whether no part thereof was paid, or whether the same was protested for non-payment, or as to the amount of the fees and charges, and cannot therefore admit, but on the contrary denies, the same; and the above-named defendant, answering the complaint of the above-named plaintiff, denies that on the 23d day of January, 1884, or at any other time, the said defendant made, executed, or delivered the promissory note in writing men-
13 tioned and described in the second cause of action stated in said complaint; and further denies that a valuable consideration or any consideration was paid to or received by the said defendant for making, executing, or delivering the said protested note mentioned and described in said second cause of action and alleged therein to be a promissory note; and, upon information and belief, further denies that said pretended promissory note mentioned and described in said second cause of action is a promissory note or purports to be made by the said defendant; and further denies that the said defendant, for value rec'd or otherwise, delivered the said paper mentioned and described in said second cause of action to the Northwestern Manufacturing and Car Company or any other corporation or person.

And the said defendant, further answering the said complaint, shows and alleges that it has no knowledge or information sufficient to form a belief as to whether thereafter and prior to its maturity, or at any other time, the said pretended note described in said second cause of action was sold or delivered for value, or otherwise, or was endorsed in blank, or otherwise, by said Northwestern Manufacturing and Car Company to the said plaintiff, or whether said plaintiff owns or holds the same, or whether the said pretended note

was duly, or otherwise, presented for payment at First National Bank of Chicago, Illinois, on the 26th day of May, 1884, or
14 at any other time, or whether no part thereof was paid, or whether the same was protested for non-payment, or as to the amount of the charges and expenses of such protest, and cannot, therefore, admit, but, on the contrary, denies the same.

I. C. SLOAN,
E. W. HELMS,
Att'ys for Def't.

STATE OF MINNESOTA, *Washington County:*

Wm. B. Birge, being duly sworn, says he is secretary of the Chicago Railway Equipment Company, defendant above named; that he has read the foregoing answer to the complaint in the above-entitled action, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

WM. B. BIRGE.

Subscribed and sworn to before me this 2d day of January, 1885.

R. S. DAVIS,
Notary Public, Washington County, Minn.

On this day, to wit, the 16th day of December, A. D. 1885, said defendant, by its attorneys, filed in said clerk's office its amended answer in said entitled cause; which said amended answer is in words and figures following, to wit:

Amended Answer.

15 Circuit Court of the United States for the Western District of Wisconsin.

THE MERCHANTS' NATIONAL BANK OF CHICAGO
vs.
THE CHICAGO RAILWAY EQUIPMENT COMPANY.

And this defendant, further answering the amended complaint in this action, denies that the respective instruments, copies of which are set forth in said amended complaint, were given, made, executed, or delivered by the defendant for the purchase prices of two hundred and fifty railway freight cars, respectively, as mentioned therein, or that two hundred and fifty railway freight cars manufactured by the payee, mentioned in said instrument, or any freight cars were sold and delivered by the said payee to the defendant as a consideration for the said instruments, or otherwise, or that any consideration whatever passed or was intended to pass from the said payee mentioned in said instruments to the said defendant on the giving or making of the said instruments respectively set forth in the amended complaint, but on the contrary thereof the defendant de-

nies that said instruments or either of them were ever given, made, executed, or delivered *to* the said defendant to the said payee, the Northwestern Manufacturing and Car Company, or that the defendant ever received any consideration whatever for the giving, making, or delivery thereof to said car company.

16 And this defendant, further answering said amended complaint, alleges and shows that prior to the first day of June, 1883, this defendant had entered into a contract with the said Northwestern Manufacturing and Car Company for the purchase of five hundred freight cars, two hundred and fifty of which had been delivered to the defendant, and were of the same numbers and descriptions and were the identical cars described in the said instruments, copies of which are set forth in said amended complaint; that the residue of said five hundred cars so contracted for by the defendant were delivered by the said car company to the said defendant on or before the 31st day of August, A. D. 1883; that this defendant gave to the said car company papers similar in character and form to the instruments set forth in said amended complaint for the said five hundred freight cars so actually purchased, and paid the same to the said car company at or before the maturity thereof, and long before the said instruments set forth in the amended complaint bear date or were issued by the said car company as hereinafter stated, and that after the purchase of said five hundred freight cars hereinbefore mentioned, paid for by the defendant as aforesaid, this defendant never purchased or contracted to purchase any cars of said car company, and that the said instruments, copies of which are set forth in the amended complaint, were never issued upon any purchase or contract for the purchase of said cars mentioned therein or of any other cars, but

17 that the said instruments, then being in blank and not filled out, having the name of George S. Burrows, vice-president, and E. D. Buffington, as treasurer, signed and written thereon, who signed the same with the intent and purpose that the same should be used in the proper and legitimate business of this defendant, and in no other way or manner whatever, came to the possession of said Northwestern Manufacturing & Car Company without the act or fault of said defendant, and the same were filled up, issued, and procured to be discounted by the said car company as its own obligation and as evidence of indebtedness which it alone was owing, and that the proceeds thereof obtained from the said plaintiff on the discount thereof were issued wholly — exclusively in the business and for the benefit of said car company without any consideration or benefit therefor to the said defendant. Wherefore this defendant shows and alleges that the said instruments and papers, copies of which are set forth in said amended complaint, and each of them, are not the instruments, papers, or promises of said defendant, and it denies all liability thereon.

And this defendant, further answering said amended complaint, shows and alleges that before the said sums of money mentioned in said instruments, copies of which are set forth in said amended complaint, became due and payable by the terms thereof the said car

company had failed in business and become insolvent, and its whole assets and property had passed into the hands of a receiver
18 duly appointed by a court having jurisdiction thereof in the State of Minnesota and became totally unable to deliver to the defendant or to vest any title in the defendant to the said freight cars mentioned and described in the said instruments, copies of which are set forth in the amended complaint, and that at and since the date of the said instruments the said car company has not had or owned any freight cars which it could have delivered, or to which the title would have vested in said defendant, on the payment of the respective sums of money mentioned in said instruments, or the payment of the sums mentioned in said twenty-four other instruments of like date and amount respectively recited in the said instruments set forth in the amended complaint as having been issued of the same dates and amounts thereof. Wherefore the defendant alleges and shows that the consideration for the said instruments set forth in the said amended complaint, so far as the said defendant is concerned, has wholly failed, and in truth and fact never had any existence.

Wherefore defendant asks that the said amended complaint may be dismissed with costs.

On this day, to wit, on the 16th day of December, in the December special term, A. D. 1885, of said court, in the record of
19 the proceedings thereof in said entitled cause, before the Honorable Romanzo Bunn, judge, is the following entry, to wit:

Trial & Verdict.

THE MERCHANTS' NATIONAL BANK OF CHICAGO

vs.

THE CHICAGO RAILWAY EQUIPMENT COMPANY.

This day came the parties, by their counsel, and this cause came on to be tried. Whereupon a jury is ordered to come, who came, to wit, H. Shipnoy, James Southord, Thomas Wilson, M. M. Zeigler, Ulrich Buehler, Jacob Roderick, Fred C. Curtis, Cornelius Collins, Walter Frazier, Nelson Kollock, Robert Collins, William Wilson, twelve honest and lawful men of the district, duly empanneled, tried, and sworn, and trial commenced.

December 17, 1885.—This day comes the parties and proceed with the trial of this cause, and the plaintiff having rested his case, and the motion of the defendant to direct verdict of the jury in favor of the defendant is argued by counsel and submitted.

December 18, 1885.—This day comes the parties, by their counsel, and proceed with the trial of the case. On consideration, it is ordered that the motion of the defendant to direct verdict of the jury in favor of the defendant is denied, and the trial is concluded and jury instructed in the law by the court; and the jurors of the jury aforesaid, upon their oath, under the direction of the court, find the

issue herein in favor of the plaintiff and assess its damages at the sum of ten thousand nine hundred forty-three dollars and
20 seventy-eight cents. On motion of defendant's counsel, it is ordered that the entry of the judgment on said verdict of the jury be, and the same hereby is, stayed for the period of sixty days.

And thereupon the defendant, by its counsel, in writing, — to set aside the verdict of the jury and for new trial as follows:

Circuit Court of the United States for the Western District of Wisconsin.

THE MERCHANTS' NATIONAL BANK OF CHICAGO

vs.

THE CHICAGO RAILWAY EQUIPMENT COMPANY.

And now, at this day, to wit, December 18, 1885, comes the said defendant and moves the court upon the minutes of the trial hereof to set aside the verdict of the jury in this action and grant a new trial herein for the following reasons:

1st. For admitting improper and irrelevant evidence against the objection of the defendant.

2d. For refusing to instruct the jury as requested by the defendant to find a verdict in its favor.

3d. For refusing to admit each and all the several offers of evidence made by the defendant.

4th. For that the verdict herein is contrary to law and evidence.

5th. For that it does not appear by the evidence in this case that the making or delivery of the instruments in writing sued on was ever authorized by the defendant corporation.

21 On this day, to wit, the 22d day of January, A. D. 1885, said defendant, by its attorneys, filed in said clerk's office its bill of exceptions in said entitled cause; which said bill of exceptions is in the words and figures following, to wit:

22 Circuit Court of the United States for the Western District of Wisconsin.

THE MERCHANTS' NATIONAL BANK OF CHICAGO, Plaintiff,

vs.

THE CHICAGO RAILWAY EQUIPMENT COMPANY, Defendant.

Be it remembered that at a stated term of the said court begun and held at the United States court-room in the city of Madison, in said district, on the first day of December, A. D. 1885, and on the 17th, 18th, and 19th days of said term the following proceedings were had before the Honorable Romanzo Bunn, district judge, sitting in said circuit court, and a jury, to wit:

The said plaintiff, in order to maintain the issue raised by the pleadings on its part by its counsel, offered in evidence a certified

copy of the articles of association of the defendant; to which counsel for the defendant objected as immaterial. The objection was overruled and the said articles admitted; to which ruling the defendant excepted.

The said articles of association are hereto annexed, marked Exhibit "A," and made a part hereof.

Counsel for the plaintiff, in order further to maintain the said issue on its part, called as a witness one J. C. O. GORMAN, who, being duly sworn, testified as follows:

I live in Stillwater, Minnesota. On being shown the two instruments in suit he says: I was treasurer of the Northwestern Manufacturing Company and Car Co. at the time these notes are dated and I endorsed them.

23 Counsel for defendant object to this testimony and to any evidence in relation to these notes and move to strike out said testimony on the ground that the instruments counted on in the complaint are sued on as promissory notes, and that the instruments presented to the witness are not promissory notes because of the provisions and conditions contained in them.

The motion to strike out said testimony was overruled and the defendant *accepted*.

Whereupon the counsel for the *defendant* asked leave to amend the complaint by inserting therein, in the statement of the first cause of action, after the words "for value received," the following—which note is in the words and figures following, to wit: Setting out a copy of the note. A copy of said instrument is hereto annexed and marked "Exhibit B." Also to amend said complaint by inserting therein, in the statement of the second cause of action, after the words "at the First National Bank of Chicago, Illinois," the following—which note is in the words and figures following, to wit: Setting out a copy of said note. A copy of said instrument is hereto annexed, marked "Exhibit C."

To which the counsel for the defendant objected. The amendment was allowed and the defendant excepted.

Whereupon the counsel for the defendant ask leave to prepare and file an amended answer to meet the amendments proposed by the plaintiff.

The court grants such leave and the court adjourns until two o'clock p. m. of said 16th day of December, A. D. 1885, for
24 the purpose of having said amended answer prepared.

The court met pursuant to said adjournment, and the amendment to the answer was presented by counsel for the defendant.

Counsel for plaintiff objected to the allowance of the amendment, on the ground that the object of the amendments to the complaint was to avoid the question of there being a variance between the allegations and proofs, and on the ground that copies of the instruments in suit were attached to depositions taken in the case seven months before the trial, and on the ground that the amendment

seeks to set up a want of signature to the instruments, without having denied such signature under oath, and on the ground that the said instruments are negotiable and held by a *bona fide* endorsee for value.

The amendment to the answer was allowed, and the plaintiff excepted.

And thereupon the plaintiff, further to maintain the issue formed by said amended pleading, recalled as a witness J. C. O. GORMAN, who testified as follows:

Upon being shown the two instruments in suit he says:

I was treasurer of the Northwestern Manufacturing and Car Co. at the date of the notes, or Jan. 20, 23, 1884. I presume I was authorized to endorse and transfer paper of that company as much as any paper I ever endorsed. The two signatures on these two notes are mine, as treasurer of the Northwestern Manufacturing & Car Company. I know Mr. Buffington. I think he was at that
25 time treasurer of the Chicago Railway Equipment Company. That (referring to the instruments) is his signature. I know George B. Burrows, and understand that he was at that time vice-president of the Chicago Railway Equipment Company. I am acquainted with his handwriting. Those (referring to the two instruments) are his signatures.

And the said witness, on being cross-examined by counsel for the defendant, testified as follows:

On January 20, 1884, I should say I had been treasurer of the Northwestern Manufacturing and Car Company about a year. I endorsed this paper as treasurer of that company.

Question. How did this paper come to your possession as treasurer of the car company?

To which question counsel for plaintiff objected as immaterial and not cross-examination; objection sustained, and defendant excepted.

The WITNESS: I did not see Mr. Burrows sign the papers. The paper was in my possession when I first saw Mr. Burrows' signature to it.

Question. How did it come to your possession?

To which question counsel for plaintiff objected as immaterial and not cross-examination; objection sustained, and defendant excepted.

The WITNESS: I cannot say that I saw Mr. Buffington sign the paper.

Question. Do you know where he signed it?

To which question plaintiff's counsel objected as imma-
26 terial and not cross-examination; objection sustained, and defendant excepted.

Counsel for defendant here offered to show, by this witness, that

the signatures of Burrows and Buffington were not attached to the paper as the officers of either the car company or the defendant company in their official capacity, and that neither Burrows nor Buffington nor any other authorized officer or agent of the defendant ever delivered the instruments in suit or authorized them to be delivered; to which offer of proof counsel for defendant objected as immaterial and not cross-examination; objection sustained, and defendant excepted.

And the counsel for the plaintiff, further to maintain the said issue on its part, called as a witness CHAUNCY J. BLAIR, who, being duly sworn, testified as follows:

I reside in Chicago, Illinois, and am vice-president of the plaintiff. The plaintiff purchased the notes in suit; it purchased the one dated January 20, 1884, and due May 23, 1884, on Feb. 7, 1884.

Question. What did you pay for the note?

To which question counsel for defendant objected as immaterial; objection overruled, and defendant excepted.

Answer. I paid five thousand dollers less five and one-half per cent. interest for the time it had to run before maturity. We discounted it at the rate of five and one-half per cent. for the time it had to run, which was one hundred and six days, on the understanding that it did not draw interest before maturity, and
27 paid for it four thousand nine hundred and nineteen dollars and three cents ($4,919.03).

The plaintiff bought the other note, February 13, 1884, for five thousand dollars less the interest at five and one-half per cent. for the time it had to run. In other words, we discounted it for five and one-half per cent. for the time it had to run, and paid for it four thousand nine hundred and twenty-one dollars and thirty-two cents ($4,921.32).

These notes were so purchased from Beveridge & Dewey, who are note-brokers in Chicago.

Question. State whether you bought them without any knowledge of any infirmity in the notes and in good faith.

To which question counsel for the defendant objected as incompetent and immaterial; objection overruled, and defendant excepted.

Answer. Yes, sir.

And the said witness, on being cross-examined by counsel for the defendant, testified as follows:

I attended personally to the purchase of both of the notes. I am unable to state which member of the firm of Beveridge and Dewey I made such purchase of; they made no claim as to the ownership of the notes or in respect to their being agents. I don't remember that they said anything about it. I won't be certain that any conversation occurred at that time about it, but we had conversation as

to the general character of the paper, either before or at that
28 time; they represented to me that the paper was genuine; they did not say it was sent to them by the car company or that they were negotiating for the car company; they were note-brokers—agents for selling notes. I don't know whose agents they were.

Question. You understood the money was to go to the car company and that these men were brokers?

Answer. That was my presumption.

Question. And yet you did not understand whether they were agents or owners?

Answer. I don't pretend to know. That is the construction to be put upon it. My understanding was from the endorsement.

Question. They told you they were agents, did they not?

Answer. They didn't tell me that that was so. I got the idea that the money was to go to the car company, because they had endorsed it. My presumption was it went to them, because their business was that of agents. I presumed they were agents of the car company in disposing of this paper.

Thereupon the counsel for the plaintiff, further to maintain the said issue on its part, offered in evidence the notes in suit described in the amended complaint.

Counsel for defendant objected to the admission thereof on the ground that the instruments are not negotiable notes, and that the plaintiff has not shown any performance or readiness to perform, on the part of the payee or otherwise, the contract of sale mentioned in the instruments offered.

29 The objection was overruled and the instruments admitted in evidence; to which ruling the defendant excepted. Copies of said instruments are hereto annexed and marked "Exhibits A & B," and made a part hereof.

The said counsel for the plaintiff, further to maintain the said issue on its part, produced and called as a witness E. D. BUFFINGTON, who, being duly sworn, testified as follows:

I was treasurer of the Chicago Railway Equipment Company on the 20 & 23rd day of January, 1884. I signed both the notes in suit as such treasurer.

On being cross-examined, the witness testified as follows:

Question. Were the notes filled up at the time you signed them?

To which question counsel for the plaintiff objected as immaterial and not cross-examination; objection sustained, and the defendant excepted.

Question. Under what circumstances did you sign them?

To which question the counsel for the plaintiff objected as immaterial and not cross-examination.

Question by the COURT: He can state when and where he signed them. I mean all that took place at the time.

The objection was overruled and the plaintiff excepted.

Answer. I signed the note at the request of J. C. O. Gorman, treasurer of the car company. Before signing them I did not confer with any officers of or person connected with the equipment company.

30 Question. At that time did you receive any directions or authority of any kind from the equipment company or any of its officers in respect to signing these notes?

To which question counsel for plaintiff objected as immaterial and not cross-examination. The objection was sustained, and the defendant excepted.

Question. You say you were treasurer of the defendant at that time. At the time of signing that paper was there any consideration of any kind which passed from the car company to the defendant?

To which question counsel for plaintiff objected as immaterial and not cross-examination. The objection was sustained, and the defendant *accepted*.

Question. When you signed those notes were they filled up or were they mere blanks?

To which question counsel for the plaintiff objected as immaterial and not cross-examination; objection sustained, and defendant excepted.

Whereupon the counsel for the plaintiff rested his case.

And the counsel for the defendant, in order to sustain and prove the issue made by the amended pleadings herein, called as a witness the said J. C. O. GORMAN, who testified as follows:

Question. Did any consideration pass from the Northwestern Manufacturing & Car Company to the defendant for these two instruments in suit?

To which question counsel for the plaintiff objected as incompetent on the ground that the said instruments are negotiable notes.

31 Question. Were any cars sold or contracted to be sold or allowed by the Northwestern Manufacturing & Car Company to the defendant as a consideration for the two instruments in suit or either of them, or did any other consideration pass from the car company to the defendant for the execution of the notes?

To which question the counsel for the plaintiff objected for the same reason.

Whereupon counsel for the defendant moved the court to direct a verdict for the defendant on the ground that the said instruments are not negotiable paper, and that the plaintiff has not shown any performance of the contract of sale set out in the said instruments nor any readiness to perform the same and has not shown any per-

formance of the consideration recited in said instruments or either of them or any readiness to perform the same by the payee of said instruments or otherwise; which motion was made *de bene esse* and with the right to produce evidence if denied.

The said motion was overruled by the court, and the defendant excepted.

And the counsel for the defendant, to maintain said issue on its part, again recalled J. C. O. GORMAN, who testified as follows:

I am the treasurer of the car company; the payee of the instruments in suit.

Question. State whether at the date of these instruments, January 20 & 23, 1884, the defendant was or was not indebted *in-*
32 *debted* to the car company in any sum whatever.

To which question counsel for plaintiff objected as tending to show want of consideration. The objection was sustained, and defendant excepted.

Question. State whether or not, at the time these notes or either of them were executed, or those of the series, there was or was not any sale and delivery of two hundred and fifty railway freight cars or any other cars by the car company to the defendant.

To which question counsel for plaintiff objected on same ground; objection sustained, and defendant excepted.

Question. State whether, at the time these instruments or any other of the series of like character, in 1884, were given, there were any cars delivered by the car company to the defendant as a consideration for these notes or otherwise.

To which question the counsel for the plaintiff objected on the same grounds; objection sustained, and defendant excepted.

Question. Did the car company carry on the business of manufacturing cars at any time?

To which question the counsel for the plaintiff objected on the same ground; objection sustained, and defendant excepted.

Whereupon the counsel for the defendant offered to prove and show by this witness that at the time the instruments in the suit were given and at the time all the instruments of the series
33 mentioned therein — the car company had no cars to sell or transfer to the defendant as a consideration for these instruments; that there was no agreement existing between the defendant and the car company for the manufacture or sale or delivery of any such cars, and that it never afterwards manufactured any cars to be sold or delivered to the defendant, and that before these notes became due and payable it became insolvent, and its property and affairs passed into the hands of a receiver, so that it was unable to transfer and deliver any such cars.

To which counsel for plaintiff objected on the same ground; objection sustained, and defendant excepted.

By the COURT: The court holds that the defendant must impeach the standing of the plaintiff as a *bona fide* holder before you can go into the consideration of the note, the testimony being offered, as the court supposes, on the ground of want of consideration.

To which ruling and statement the defendant excepted.

Question. State whether there was ever any consideration—and, if so, what—passing from the car company to the defendant for these notes or either of them.

To which question counsel for the plaintiff objected on same ground; objection sustained, and defendant excepted.

Thereupon counsel for defendant made and filed the following offer of testimony:

The defendant offers to prove by the witness upon the stand—

34 1st. That the instruments sued on were wholly without consideration moving from the payee, the Northwestern Manufacturing & Car Company, to the defendant company.

2nd. That George B. Burrows and E. D. Buffington, whose names appear upon the said instruments as vice-president and treasurer of said defendant company, respectively, had no authority from said defendant company to sign, make, or deliver said instruments; that said instruments were never delivered by said defendant company or by any officer or agent thereof having authority to deliver the same.

To which the counsel for the plaintiff objected. The objection was sustained, and the defendant excepted. The defendant here rested its case, and the counsel for the plaintiff, further to maintain the said issue on its part, recalled CHAUNCY J. BLAIR, who testified as follows:

I have computed the amount due on the notes in suit and find to be due on one note to be five thousand four hundred and seventy-three dollars and fourteen cents ($5,473.14), and on the other five thousand four hundred and seventy dollars and sixty-four cents ($5,470.64), at six per cent. interest from the date of maturity, including to-day, Dec. 18, 1885, and including protest fees of two dollars and thirty-one cents ($2.31) on each note. The total amount is ten thousand nine hundred and forty-three dollars and seventy-eight cents ($10,943.78).

35 For which sum the court thereupon directed the jury to render their verdict for the plaintiff; to which direction counsel for the plaintiff excepted.

And inasmuch as none of the aforesaid matters, proceedings, offers of evidence, rulings, or exceptions appear of record in said *course*, the said judge who tried the same has settled and signed this bill of exceptions and sealed the same, to the end that all the aforesaid matters, proceedings, offers of evidence, rulings, and exceptions may become and be a part of the record in the aforesaid cause, and does hereby certify that the foregoing bill of exceptions contains all of the evidence given or received upon the trial of said action.

Done at Madison, in said district, at the same term, to wit, on the 27th day of January, A. D. 1886, being the 42nd day of the said December term of the said court.

ROMANZO BUNN, *Judge.* [SEAL.]

36 "EXHIBIT A."

Know all men by these presents that the undersigned, adult residents of the State of Wisconsin, do hereby make, sign, and agree to the following—

Articles of Organization.

Article first. The undersigned have associated and do hereby associate themselves together for the purpose of forming a corporation under the Revised Statutes of the State of Wisconsin for the year A. D. 1878, and acts amendatory thereof and supplementary thereto, the business and purposes of which corporation shall be the buying, holding, and selling, leasing, hiring, and generally dealing in railway cars, locomotives, equipment, and rolling stock of every kind and description in use upon railways and convenient in the business of railway transportation; which said business is to be carried on within the States and Territories of the United States.

Article second. The name of such corporation shall be "Chicago Railway Equipment Company," and its location shall be at Madison, in the county of Dane and State of Wisconsin.

Article third. The capital stock of said corporation shall be one million dollars, and the same shall consist of ten thousand shares, each of which said shares shall be of the face or par value of one hundred dollars.

Article fourth. The general officers of said corporation
37 shall be a president, vice-president, secretary, and treasurer, and the board of directors shall consist of five stockholders.

Article fifth. The principal duties of the president shall be to preside at all meetings of the board of directors and to have a general supervision of the affairs of the corporation.

The principal duties of the vice-president shall be to discharge the duties of the president in the event of the absence or disability for any cause whatever of the latter.

The principal duties of the secretary shall be to affix the seal of the corporation to such papers as shall be necessary, to keep the records of the proceedings of the board of directors, and to safely and systematically keep all books, papers, records, and documents belonging to the corporation or in anywise pertaining to the business thereof.

The principal duties of the treasurer shall be to keep and account for all moneys, credits, and properties of any and every nature of the corporation which shall come into his hands, and to keep an accurate account of all moneys received and disbursed and proper vouchers for moneys disbursed, and to render such accounts, statements, and inventories of moneys received and disbursed and of

money and property on hand, and generally of all matters
38 pertaining to his office as shall be required by the board of directors or the executive committee, if there shall be one.

The board of directors may elect an executive committee, consisting of three directors, of which committee the president shall be a member, and the executive committee shall have and exercise, by a majority of its members, all the powers of the board of directors when the board shall not be in session.

The board of directors or the executive committee may provide for the appointment of such additional officers as they shall deem for the best interests of the corporation.

Whenever the board of directors shall so order, the offices of secretary and treasurer may be held by the same person.

The said officers shall perform such additional or different duties from those hereinabove specified as shall from time to time be imposed or required by the board of directors or the executive committee, or as may be prescribed from time to time by the by-laws.

Article sixth. Only persons holding stock, according to the regulation of the corporation, shall be members of it.

39 Article seventh. These articles may be amended by resolution setting forth such amendment or amendments adopted at any meeting of the stockholders by a vote of at least two-thirds of all the stock of said corporation then outstanding.

In witness whereof we have hereunto set our hands this eleventh day of January, A. D. 1883.

GEORGE B. BURROWS.
JOHN C. SPOONER.
D. B. TAYLOR.

Signed in presence of—
GEO. B. KIDDER.
CHAS. N. GREGORY.

STATE OF WISCONSIN, } ss:
County of Dane, }

Personaly came before me, this eleventh day of January, A. D. 1883, the above-named George B. Burrows, John C. Spooner, and D. B. Taylor, to me known to be the persons who executed the foregoing instrument, and acknowledged the same.

[SEAL.] CHAS. N. GREGORY,
Notary Public, Dane Co., Wisconsin.

STATE OF WISCONSIN, } ss:
Dane County, }

John C. Spooner and D. B. Taylor, being first duly sworn severally, each for himself, on his oath, says that he has compared the foregoing copy with the original articles of organization this day executed by George B. Burrows and affiants, and that the
40 same is a true and correct copy of said original and of the whole thereof.

JOHN C. SPOONER.
D. B. TAYLOR.

Sworn to and subscribed before me this eleventh day of January, A. D. 1883.

[SEAL.] CHAS. N. GREGORY,
Notary Public, Dane County, Wisconsin.

STATE OF WISCONSIN, *Department of State,* } ss:

Received and filed this 11th day of January, A. D. 1883.

[Forward. E Pluribus Unum.]

EARNEST G. TIMME,
Secretary of State.

UNITED STATES OF AMERICA.

STATE OF WISCONSIN, *Department of State,* } ss:

To all to whom these presents shall come:

I, Earnest G. Timme, secretary of state of the State of Wisconsin, do hereby certify that the foregoing copy of articles of association of the "Chicago Railway Equipment Company" has been compared by me with the original verified copy, filed in this department, and that the same is a true copy thereof and of the whole of such original verified copy.

In testimony whereof I have hereunto set my hand and affixed my official seal, at the capitol, in the city of Madison, this sixteenth day of June, A. D. 1885.

[SEAL.] EARNEST G. TIMME,
Secretary of State.

41 EXHIBIT "B."

$5,000. CHICAGO, ILL., *January 20th, A. D.* 1884.

For value received, four months after date, the Chicago Railway Equipment Company promises to pay to the order of the Northwestern Manufacturing and Car Company of Stillwater, Minnesota, five thousand dollars, at First National Bank of Chicago, Illinois, with interest thereon at the rate of — per cent. per annum from date until paid.

This note is one of a series of twenty-five notes, of even date herewith, of the sum of five thousand dollars each, and shall become due and payable to the holder on the failure of the maker to pay the principal or interest of any one of the notes of said series, and all of said notes are given for the purchase price of two hundred and fifty railway freight cars manufactured by the payee hereof and sold by said payee to the maker hereof, which cars are numbered from 13000 to 13249, inclusive, and marked on the side thereof with the words and letters "Blue Line C. & E. I. R. R. Co.;" and it is agreed by the maker hereof that the title hereof to said

cars shall remain in the said payee until all the notes of said series, both principal and interest, are fully paid, all of said notes being equally and ratably secured on said cars.

GEORGE B. BURROWS, *Vice-Pres't.*

42 E. D. Buffington, treas. First National Bank of Chicago. Returned no account. Protested for non-payment May 23rd, 1884. E. P. Runyon, notary public.

EXHIBIT "C."

$5,000. CHICAGO, ILL., *January 23rd, A. D.* 1884.

For value received, four months after date the Chicago Railway Equipment Company promise to pay to the order of the Northwestern Manufacturing and Car Company of Stillwater, Minnesota, five thousand dollars, at First National Bank of Chicago, Illinois, with interest thereon at the rate of — per cent. per annum from date until paid.

This note is one of a series of twenty-five notes, of even date herewith, of the sum of five thousand dollars each, and shall become due and payable to the holder on the failure of the maker to pay the interest or principle of any one of the notes of said series, and all of said notes are given for the purchase price of two hundred and fifty railway freight cars manufactured by the payee hereof and sold by said payee to the maker hereof, which cars are numbered from 13000 to 13249, inclusive, and marked on the side thereof with the words and letters "Blue Line C. & E. I. R. R. Co.,"
43 and it is agreed by the maker hereof that the title to said cars shall remain in the said payee until all the notes of said series, both principal and interest, are fully paid all, of said notes being equally and ratably secured on said cars.

GEORGE B. BURROWS, *Vice-Pres't.*

E. D. Buffington, treas. First National Bank of Chicago. Returned no account. Protested for non-payment May 26, 1884. E. P. Runyon, notary public. Northwestern M'f'g & Car Co., per J. C. O. Gorman, treas.

On this day, to wit, the 10th day of May, A. D. 1886, in the December special term of said court, in the record of the proceedings thereof in said entitled cause, before the Honorable Romanzo Bunn, judge, appears the following entry:

THE MERCHANTS' NATIONAL BANK OF CHICAGO
vs.
THE CHICAGO RAILWAY EQUIPMENT COMPANY.

The motion for a new trial herein coming on to be heard, it is ordered that the same be set for hearing the 1st day of the
44 June term, and shall be heard on or before the 3d day of said term, and if a new trial shall be allowed the case *shall be allowed the case* shall stand for trial at said term at the plaintiff's option.

On this day, to wit, the 8th day of June, in the June term, A. D. 1886, of said court, in the record and proceedings thereof in said entitled cause, before the Honorable Romanzo Bunn, judge.

THE MERCHANTS' NATIONAL BANK OF CHICAGO
vs.
THE CHICAGO RAILWAY EQUIPMENT COMPANY.

The motion for new trial made by the defendant came on this day to be heard upon the minutes of the court as embraced in the bill of exceptions filed herein; and Mr. I. N. Pinney having appeared for said defendant in support of said motion, Messrs. Gregory & Gregory for said plaintiff in opposition thereto, and upon hearing said counsel for the parties, and upon consideration thereof, it is ordered that the said motion be, and the same is hereby, denied.

To which ruling the defendant excepted.

And thereupon, on motion of plaintiff's attorneys, it is considered and adjudged by the court now here that the said plaintiff do have and recover of the said defendant, The Chicago Railway
45 Equipment Company, ten thousand nine hundred and forty-three dollars and seventy-eight cents so as aforesaid assessed by the jury, with four hundred and nine dollars and eighteen cents, its costs about its said suit in this behalf by it expended, and that it have execution therefor.

And comes the defendant and files in said clerk's office second bill of exceptions as follows, to wit:

Circuit Court of the United States for the Western District of Wisconsin.

THE MERCHANTS' NATIONAL BANK OF CHICAGO
vs.
THE CHICAGO RAILWAY EQUIPMENT COMPANY.

Be it remembered that heretofore, to wit, on the 18th day of December, A. D. 1885, upon the rendition of the verdict in this cause, the said defendant, by its attorneys, filed a motion for a new trial and to set aside the said verdict for the following reasons, to wit:

For the admission by the court upon the trial of improper and irrelevant evidence against the objection of the defendant.

For refusing to instruct the jury, as requested by the defendant, to find a verdict in its favor.

For refusing to admit each and all the several offers of evidence made by defendant.

For that the said verdict is contrary to law and the evidence.

And for that it does not appear by the evidence in this cause that the making or delivery of the instruments in writing
46 sued on was ever authorized by the defendant corporation.

Which motion was continued for argument and opinion; and that afterwards, to wit, at a term of said court begun and held at the United States court-room in the city of Madison, in said district, on

Monday, the seventh day of June, A. D. 1886, to wit, on the said motion come on to be heard upon the minutes of the court of the trial of the action as embraced in the former bill of exceptions filed herein, the said motion having been continued to that time for hearing, and upon consideration and argument thereof, the court overruled and denied the same; to which said ruling the said defendant, by its counsel, then and there excepted.

And inasmuch as the said motion, ruling, and decision and exception thereto —, the said district judge, the Honorable Romanzo Bunn, presiding at said trial, hath signed, settled, and sealed this second bill of exceptions, to the end that the matters aforesaid may be made part of the record of the trial of said action, this ninth day of June, A. D. 1886.

ROMANZO BUNN,
Dist. Judge.

And afterwards, to wit, on the 24th day of June, A. D. 1886, came the defendant, by its counsel, and filed its bond on writ of error in the above-entitled cause; which said bond is in words and figures following, to wit:

47 Circuit Court of the United States for the Western District of Wisconsin.

MERCHANTS' NATIONAL BANK OF CHICAGO
vs.
CHICAGO RAILWAY EQUIPMENT COMPANY.

Know all men by these presents that we, Wayne Ramsay and M. C. Clarke, of the city of Madison, State of Wisconsin, are held and firmly bound unto The Merchants' National Bank of Chicago in the sum of three hundred dollars, to be paid to the said Merchants' National Bank of Chicago, its successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 24th day of June, 1886.

Whereas the above-named Chicago Railway Equipment Company hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the circuit court of the United States for the western district of Wisconsin on the 9th day of June, 1886:

Now, therefore, the condition of this obligation is such that if the above-named Chicago Railway Equipment Company shall prosecute its said writ of error to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

48 WAYNE RAMSAY. [SEAL.]
M. C. CLARKE. [SEAL.]

In presence of—
I. C. SLOANE.
E. A. RECKARTS.

UNITED STATES OF AMERICA,
Western District of Wisconsin, } *ss:*

—— ——, being duly sworn, each for himself, deposes and says, each for himself, that he is worth the sum of six hundred dollars over and above all his just debts and liabilities and exemptions.

WAYNE RAMSAY.
M. C. CLARKE.

Taken, subscribed, and sworn before me this 24th day of June, A. D. 1886.

E. F. RILEY,
Notary Public, Wis.

The foregoing bond is hereby approved both as to form and sufficiency of sureties.

Madison, June 24, 1886.

R. BUNN,
District Judge.

And on same day, to wit, June 24, 1886, came the defendant, by its counsel, and filed its citation on writ of error—service admitted; which original citation is as follows, to wit:

49 UNITED STATES OF AMERICA, *ss:*

To the Merchants' National Bank of Chicago, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the seventh circuit and western district of Wisconsin, wherein The Chicago Railway Equipment Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 24 day of June, A. D. 1886.

R. BUNN,
District Judge, Western District of Wisconsin, and One of the Judges of said Circuit Court.

GREENLEAF CLARK,
I. C. SLOAN, AND
PINNEY & SANBORN,
Attorneys for Pl'ff in Error.

50 [Endorsed:] Circuit court United States, western dist. of Wisc. Merchants' National Bank of Chicago *vs.* Chicago Railway Equipment Company. Citation. Received a copy of the within citation this 24th day of June, 1886. Gregory & Gregory, pl'ff's att'ys. Filed June 24, 1886. F. M. Stewart, cl'k.

51 UNITED STATES OF AMERICA,
Western District of Wisconsin:

I, F. M. Stewart, clerk of the circuit court of the United States for the western district of Wisconsin, do hereby certify that I have compared the above and foregoing with the original record and proceedings now remaining of record and on file in my office in the above-entitled cause, and that it is a correct transcript therefrom, and also a true copy of the bond on writ of error, and also that the original citation on writ of error in said cause and service thereof is annexed to said transcript of record.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office, in the city of Madison, this 23d day of August, A. D. 1886, and of our Independence the 111th.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin.]

F. M. STEWART, *Clerk.*

Endorsed on cover: W. Wisconsin C. C. U. S. No. 327. The Chicago Railway Equipment Company, plaintiff in error, *vs.* The Merchants' National Bank of Chicago. Filed August 28, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

THE CHICAGO RAILWAY EQUIPMENT COMPANY,
Plaintiff in Error,

vs.

THE MERCHANTS NATIONAL BANK OF CHICAGO,
Defendant in Error.

Brief and Assignment of Errors of Plaintiff in Error.

GREENLEAF CLARK,
Counsel for Plaintiff in Error.

H. M. SMYTH PRINTING COMPANY, ST. PAUL.

Supreme Court of the United States.

THE CHICAGO RAILWAY EQUIPMENT COMPANY,
Plaintiff in Error,

vs.

THE MERCHANTS NATIONAL BANK OF CHICAGO,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This was an action instituted in the Circuit Court of the United States for the Western District of Wisconsin, by the defendant in error, a banking corporation organized under the National Banking Act, having its place of business in Chicago, Ill., against the plaintiff in error, a corporation organized under the laws of Wisconsin, upon two certain instruments in writing, one bearing date January 20, 1884, and the other January 23, 1884, both being, except as to date, in the form following, viz :

"$5000. Chicago, Ill., January 20, A. D. 1884.

"For value received four months after date the Chicago Railway "Equipment Company promise to pay to the order of the North- "western Manufacturing and Car Company of Stillwater, Minnesota, "five thousand dollars at First National Bank of Chicago, Illinois, "with interest thereon at the rate of —— per cent per annum from "date until paid.

"This note is one of a series of twenty-five notes of even date "herewith of the sum of five thousand dollars each, and shall become "due and payable to the holder on the failure of the maker to pay "the principal and interest of any one of the notes of said series, "and all of said notes are given for the purchase price of two hun- "dred and fifty railway freight cars, manufactured by the payee "hereof and sold by said payee to the maker hereof, which cars are "numbered from 13,000 to 13,249 inclusive, and marked on the side "thereof with the words and letters Blue Line C. & E. I. R. R. Co., "and it is agreed by the maker hereof that the title to said cars shall "remain in the said payee until all the notes of said series, both prin- "cipal and interest, are fully paid, all of said notes being equally "and ratably secured on said cars.

"GEO. B. BURROWS,

"Countersigned by "Vice-President.

"E. D. BUFFINGTON, Treasurer.

Endorsed:

"NORTHWESTERN MANUFACTURING AND CAR CO.,

"Per J. C. GORMAN, Treas."

The defendant in error claimed that it was a *bona fide* indorsee for value of the paper before maturity, from the Northwestern Manufacturing and Car Company, a corporation organized and existing under the laws of the State of Minnesota, and declared upon the instruments as promissory notes. (Printed record, fols. 6 to 11.)

The amended answer of the plaintiff in error averred an entire want of consideration and delivery to the payee named of either of

the instruments in question, that they were not nor was either of them ever issued by or on behalf of the plaintiff in error, and denied that they were in any sense the obligations of said plaintiff in error, and further averred that before said instruments became due and payable according to any of the terms thereof, the said payee named therein became insolvent, and its whole assets and property passed into the hands of a receiver, duly appointed by a court having full and complete jurisdiction in the premises, and that it became impossible for it to deliver to or vest in the said plaintiff in error the title to the freight cars in said instruments described or any freight cars whatever, and that it has ever since said time been wholly impossible for it so to do. (Printed record, fols. 15–19.)

Upon the trial before Bunn, District Judge, and a jury, the defendant in error was allowed, against the objection and exception of the plaintiff in error (Printed record, fols. 23–27), to prove the signature of the vice president and treasurer of the plaintiff in error and the indorsement and transfer by the Northwestern Manufacturing and Car Company to the defendant in error of the instruments in question, and without showing any performance or ability or readiness to perform on the part of the person named as payee in said instruments, to offer and have received in evidence each of said instruments. Having then rested its case, the plaintiff in error, saving its right to offer evidence in its own behalf if the motion should be denied, moved that a verdict be directed in its favor, upon the ground that the instruments in question were not negotiable promissory notes, and that the defendant in error had not shown any performance or readiness to perform the said contracts, or either of them, by or on behalf of the payee named therein or otherwise; which motion was overruled and exception taken. (Printed record, fol. 31.)

The plaintiff in error on its own behalf, both on cross-examination of the witnesses produced by defendant in error and by the testimony of witnesses produced upon its own behalf, offered to show that there was never any consideration for either of said instruments as between the alleged maker and payee; that before

the time for payment of either of the instruments in question the payee therein named had become insolvent and its property and affairs had passed into the hands of a receiver, and that it had not at the time of the date of said instruments, or at any time subsequent, any cars whatever to sell or transfer to the plaintiff in error; that the said instruments were never signed by either the vice president or treasurer of plaintiff in error in their capacity of officers of said company, or by the authority of said plaintiff in error, and that said instruments were not nor was either of them ever issued or delivered by said plaintiff in error or by any officer or agent having authority so to do. To each and all of which counsel for plaintiff in error objected, and objection being sustained, the plaintiff in error excepted. (Printed record, fols. 32, 33, 34, 25, 26, 30, 31.)

The plaintiff in error resting its defense, the court instructed the jury to find a verdict for defendant in error for the amount testified to be unpaid on each of such instruments; to which instruction the plaintiff in error also duly excepted. (Printed record, fol. 35.)

A motion for a new trial was then duly made upon behalf of the plaintiff in error (printed record, fol. 20), denied, and exception on behalf of plaintiff in error taken. (Fol. 44.)

ASSIGNMENT OF ERRORS.

1st. The court erred in admitting in evidence either of the instruments sued upon without proof that the contract therein contained on the part of the payee therein named had been performed by a transfer of the title of the property mentioned therein as the consideration of the promise of the maker thereof, or a readiness or willingness to perform on its part, or that such performance had been waived.

2d. The court erred in refusing to direct a verdict in favor of the plaintiff in error, at the close of the case of the defendant in error,

the defendant in error having failed to show a readiness or ability on the part of the payee in the instruments to transfer or deliver the title to cars therein described, or any waiver by the plaintiff in error.

3d. The court erred in refusing to admit evidence offered on behalf of the plaintiff in error showing or tending to show a want of consideration to such plaintiff in error for either of said instruments.

4th. The court erred in refusing to admit the evidence offered on behalf of plaintiff in error that the persons signing said instruments and each of them, on behalf of plaintiff in error, had no authority to sign, make or deliver the same.

5th. The court erred in refusing to allow cross-examination of the witnesses Gorman and Buffington as to the consideration and circumstances attending the execution of each of said instruments.

6th. The court erred in refusing to allow the introduction of evidence on behalf of the plaintiff in error tending to show that the instruments in question were never delivered by said plaintiff in error or by any officer or agent thereof having authority so to do.

7th. The court erred in directing the jury to find a verdict in favor of the defendant in error.

8th. The court erred in refusing to grant the motion of the plaintiff in error to set aside the verdict of the jury and grant a new trial of said action.

ARGUMENT.

The correctness of the rulings of the court below in the matter of the several errors assigned is dependent upon the character of the instruments sued upon, and upon whether they are to be regarded as negotiable paper in the technical commercial sense of that term, and in the hands of indorsees who have paid value and taken them before maturity without notice of defences as between original parties, to be held and enforced with all the peculiar privileges that by the custom of merchants pertain to bills of exchange, or whether they are anything more than simple contracts transferable in their nature, but subject in the hands of tranferees to all equities and matters of defence to the same extent as if they had remained in the hands of the original parties thereto.

The issue is a simple one, the defendant in error claiming that they are negotiable promissory notes, the plaintiff in error that they are not.

The requisites of a negotiable promissory note are few and simple. There must be an absolute unconditional promise in writing to pay a specified sum at a definite time therein limited.

Chitty on Bills, 17.
Byles on Bills, 5.
Nunez vs. Dantel, 19 Wall. 560.
Cayuga Co. Bank vs. Purdy, 56 Mich. 6.

The instrument must not be uncertain as to the amount to be paid nor the time when such payment will be made; nor be coupled with any agreement or matter that will render the obligation to pay at the time limited, contingent or uncertain. It should carry upon its face full information of all matters necessary to its successful negotiation, so that one to whom it may be delivered need only to read it to be able to determine its value at maturity and its negotiable properties. A person taking such paper before maturity *bona fide* and for value has no concern with private history that may

belong it. This peculiar privilege, however, belongs to no other class of obligations, and if an instrument, though made in the form of a promissory note, lacks either of the essential elements requisite or contains other agreements or matters not merely directory or collateral to the absolute obligation to pay the definite sum stated at the certain and definite time limited, it cannot be said to belong to the privileged class, but sinks to the level of an ordinary agreement.

The instruments here in dispute lack the essential elements of negotiable paper, for the reasons:

1st. That the time of payment of any amount named therein is by the terms of the instrument uncertain and contingent;

2d. The instruments each import, not an absolute obligation to pay a definite sum at a fixed time, but a mere conditional sale of personal property with mutual dependent conditions that make the obligation to pay any amount a contingent one;

And while there may have been of late years a growing tendency to broaden the class of instruments that should be regarded as negotiable, we do not think there are any well considered authorities that sustain as negotiable, instruments of the class to which these undoubtedly belong.

I.

The time of payment of each of the instruments is by the terms thereof so indefinite, uncertain and contingent, as to destroy the negotiable character that might otherwise attach thereto.

Each of the instruments in question is an entirety, and to ascertain its character and what is represented by it, resort must be had to all the terms and conditions therein contained,—the promise to pay a certain sum four months after date is in each instance to be taken in connection with and as modified and changed by what follows. The promise to pay, in four months from date, is subject at all times to the contingency that no default occurs as to either of

the other twenty-four notes of the series, the terms and conditions of which do not appear from the instrument in question.

One of the principal reasons, if not the principal reason, suggested in the authorities why a certain and definite time of payment must be shown by the instrument itself and is necessary to its free negotiation is that its value must be readily and accurately ascertained from mere inspection of the instrument. Another however, and fully as cogent a reason for the necessity of such certainty grows out of the relation that may exist between indorser and indorsee of the paper. The necessity of the holder at maturity knowing the exact time when payment will be due, that he may duly present the paper for payment or acceptance, and in case of non-payment be able promptly to notify prior indorsers of the dishonor, and so preserve the benefits of the contract of suretyship incidental to the relation of indorser and indorsee—and which perhaps more than anything else adds to the currency of negotiable paper in the commercial world—makes it of vital importance that the time of payment appear with certainty upon the face of the instrument itself, and that it be not left to be determined by the happening of uncertain and contingent events, which if they occur may be without his knowledge or means of knowledge until too late to be of any avail. It may be said that some authorities in considering the first reason suggested have overlooked or lost sight of the second, and held paper negotiable that did not furnish information that would enable the holder to ascertain when the due date should arrive and have been regarded as authorizing a claim that if a note may be said to be payable at some time certain to arrive, its negotiable character will not be affected by the fact that the event which is to determine the due date is uncertain with reference to the time of its occurrence; and that such cases tend to sustain, so far as this question is concerned, the negotiable character of the paper here in question upon the theory that it is to become payable at all events four months after date, and the due date may be simply hastened by the contingency of default as to the other notes before that time. The decisions however, such as they are, from which such a deduction

might be drawn, have usually been made in the consideration of paper of a very different character from that involved in the present case, and without an examination into all the matters proper to be considered in laying down a general rule for universal application; while the earlier decisions which in many instances were followed blindly, have been greatly weakened if not entirely overruled by cases of later consideration in the same jurisdiction, and their doctrine so far as the same might be applicable here, repudiated by decisions of other courts supported by the better reasons.

The first case in which the principle that the time of payment should be definite and ascertainable from the instrument itself seems to have been overlooked, was *Andrews vs. Franklin, 1 Str. 24* (1817), an action on a note payable two months after a certain government ship should be paid off. It was claimed that the ship might never be paid off, and for that reason the time of payment was contingent and might never arrive. The court held, however, that the paying off of the ship was a matter of public nature and sure to occur, and the note therefore negotiable.

It does not appear from the report, however, whether the court considered the paying off as bound to happen on a certain specified day, so that except for the objection that the paying off might not, notwithstanding the confidence of the court, happen at all, the case does not appear to be against the principle here contended for. But in any event there is every reason to believe that this case and the case of *Evans vs. Underwood, 1 Wils. 262*, involving the same facts and which followed soon afterwards, would not now be considered law. (*Weidler vs. Kauffman, 14 Ohio, 455, at p. 460. Story on Bills, 4th ed., p. 58.*)

Andrews vs. Franklin was followed in 1743 by *Colehan vs. Cooke, Willes, 393*, an action on a note conditioned for the payment of a certain sum ten days after the death of the maker's father. The question of the ability to ascertain the value of the note seems to have been the only one considered, and it was urged that the due date being dependent upon such an uncertain event as a man's

death, the value during his lifetime was unascertainable. The court, however, upon the authority of *Andrews vs. Franklin*, held it negotiable, surmounting the objection made by the argument that a person's age being known, the value of the life was easily ascertainable by recognized tables and calculations; an argument that seems hardly sufficient to relieve the paper from the necessity of a somewhat speculative valuation.

Colehan vs. Cooke, however, when undertaken to be applied to paper such as is in controversy in the present case, may well be regarded as seriously impeached if not entirely overthrown in the jurisdiction in which it was rendered by the decision of *Lord Campbell*, C. J., in *Alexander vs. Thomas, 16 Q. B. 333* (1851.) That was an action upon a bill of exchange drawn by defendant upon one Shadwell, payable ninety days after sight, "*or when realized.*" Shadwell's refusal to accept was averred, although more than ninety days after sight had elapsed; and judgment having been entered upon a plea by defendant that he did not make his bill of exchange *modo et forma*, a rule *nisi* to arrest the judgment was procured on the ground that the bill of exchange was payable upon a contingency, and the declaration therefore bad. *Campbell*, C. J., said: "I am of "opinion that judgment must be arrested unless this is a good bill "of exchange according to the custom of merchants. If we could "reject the words 'or when realized' as insensible, the bill would "certainly be unexceptionable. But a reasonable meaning has "already been ascribed to them, viz., 'or when you are in funds for "the purpose.' I do not see why this alteration is to be taken as "limited to the term before the expiration of the ninety days rather "than after. I should say that the meaning is that the bill is to be "paid at the end of ninety days if the drawer should be then in "funds, if not, it shall be afterwards. *Even, however*, if the other "is the right meaning, that the bill is payable sooner if the drawer "shall be sooner in funds, and if not, at the end of ninety days "at all events, I think this would not be a good bill, for the "holder would have to watch and ascertain the precise time when

"the bill should become payable, and if he failed in doing this and "in duly presenting it the drawer would be discharged. I am of "opinion that this is not a good bill of exchange, drawn according "to the custom of merchants, so as to relieve the plaintiff from the "necessity of stating a consideration for it."

See also *MacArthur-Stewart vs. Fullerton*, *Morr. Dict. Dec. 1408* (1782).

Colehan vs. Cooke seems first to have obtained a foothold in this country through *Cota vs. Buck*, *7 Met. 588* (1844), the case of a note payable "in the course of the season now coming, or sooner if realized out of property I have bought this day of J. P.," and in connection with that case, since overruled, furnishes the foundation for a number of decisions in this country that seem to have been made upon the theory of following precedent rather than principle.

Of this class are a number of cases brought upon notes payable at a definite time stated or before if realized out of the sale of a particular implement.

The leading case, and one which some subsequent ones have seen fit simply to follow without question or consideration, was *Ernst vs. Steckman*, *74 Pa. St. 13* (1876), an action on a note payable twelve months after date, or before if made out of the sale of a certain seeding machine.

The court attempts to distinguish *Alexander vs. Thomas*, and citing *Jordan vs. Tate*, *19 Ohio St., 586*, the case of a note payable "on or before" a certain date, *Cota vs. Buck*, practically overruled in the state where rendered, and *Carlon vs. Kenealey*, the case of a note payable in installments with a provision that default in one installment should render the whole amount due, an authority that Pollock, C. B, in *Miller vs. Biddle*, *13 L. T. Rept. N. S. 334*, says is contrary to principle, attempts to deduce the principle that though it is necessary in a negotiable instrument that the time of ultimate payment be fixed and certain, yet that it may also be subject to contingencies upon the happening of which it may become absolutely due before that date if the contingency is one indicated by the

note or is dependent upon some act done or to be done by the maker.

The authorities cited, so far as of any value, do not, we think, warrant the deductions attempted to be drawn.

The next case of this class was *Walker vs. Woolen, 54 Ind. 164* (1876), upon a note similar in all respects to that considered in *Ernst vs. Steckman*. The court however, instead of making deductions held the paper to evidence an absolute promise to pay on the due date named, with an additional conditional promise to pay before, which, if not performed, in no way affected or interfered with the absolute promise, a reason that would place this class of cases in entire harmony, with what is claimed should be the rule in the present one. Here there is but one agreement, that is to pay in four months or sooner if the contingency that hastens the due date occurs. There is to be but one due date, and that an absolute one; it may be at the end of the four months or it may be before; if before, the four months provision is practically eliminated, as it becomes immaterial.

The subsequent cases arising on this class of notes, where a like result is reached, seem to rest content with blindly following with little or no comment in the footsteps of *Ernst vs. Steckman* and *Walker vs. Woolen*.

See *Woolen vs Ulrich, 64 Ind. 120* (1878).
Charlton vs. Reed, 61 Iowa, 166 (1883).
Cisne vs. Chidester, 85 Ill. 523, (1877).

Another class of cases which will doubtless be urged as holding a doctrine adverse to that we here contend for, are those holding notes payable "on or before" a day named to be negotiable. To this class belong

Jordan vs. Tate, 19 Ohio St. 586 (1869).
Mattison vs. Marks, 31 Mich. 421 (1875).

Although the negotiable character of this class of notes is now distinctly denied in Massachusetts by the court that decided *Cota vs. Buck*, (see *Way vs. Smith, 111 Mass. 523* (1873); *Stults vs. Silva, 119 Mass. 137* (1875); *Mahoney vs. Fitzpatrick, 133 Mass. 151* (1882); they may, without materially affecting the case at bar, be held negotiable upon the grounds stated in *Mattison vs. Marks;* that is, that the promise is to be regarded as an absolute one to pay at a day certain with a mere right or option reserved to the maker to pay if he so desires prior to that time, a rule the application of which might render the exact value of the note to an extent uncertain, inasmuch as the amount of interest that would otherwise be paid might be lessened, but would in no way prejudice the rights of indorsees; for the option to pay before the due date being exercised, there is no necessity for demand or notice to prior indorsers. It is a mere payment in advance of legal liability, and terminates all obligations by performance.

Another class of decisions that will doubtless be urged as sustaining the position that the notes here in question are negotiable so far as the question of the time of payment is concerned, are those made with reference to notes payable in installments, with a provision that on defanlt of any installment the entire amount will become due. With the principle that the note to be negotiable should be such that its value may at any time be determinable from its face the cases of this class are in conflict, but with the further requirement that its terms should be such that the holder should not have to watch continuously for ulterior events to ascertain when the due date will arrive, they are not. They rest, however, upon rather uncertain ground.

The leading case of this class is *Oridge vs. Sherborne, 11 M. & W. 374* (1873), which, however, really had nothing to do with the question. That was an action by an indorsee against the maker for an installment of a note, simply payable in installments, and the question presented was as to the right to days of grace for each installment.

The case of *Carlon vs. Kenealy*, *12 M. & W. 139*, followed in the same year. This was an action by an indorsee against the maker upon a note payable in installments, with a provision that on default in any installment the whole amount secured should become due. The court held itself bound by *Oridge vs. Sherborne*, which it seems did not involve the point at all, and declared the note negotiable.

If *Carlon vs. Kenealy* shall be considered to rest alone on the authority of *Oridge vs. Sherborne*, it can have but little weight; if it be considered as standing alone its weight as an authority of principle is materially lessened by Pollock, C. B., in *Miller vs. Biddle*, *13 L. T. Rept. N. S. 334* (1865), an action upon a note like the one in question in *Carlon vs. Kenealy*. In his opinion he says:

"The majority of the court are of the opinion that *Carlon vs.* "*Kenealy* concludes this case, and therefore that the rule must be "discharged. * * * * There is a great difference between "holding that a note is a negotiable instrument notwithstanding it "is payable in installments, and holding that it is a negotiable instru- "ment where it contains a stipulation by which the whole becomes "immediately due on default of payment of one installment.

"In *Carlon vs. Kenealy* the court thought that *Oridge vs. Sher-* "*borne* concluded them. I think that this was not the case, though "their decision is none the less binding than if *Oridge vs. Sher-* "*borne* had turned on the same point. If this were *res integra* I "should be of opinion that this instrument was not within the "statute. The custom of merchants has nothing to do with any but "negotiable instruments, and I feel confident that if the question "should come to be decided with respect to a bill of exchange there "would be found to be no custom of merchants in the case of a bill "of exchange with such a stipulation as that contained in this note, "for I think no such bill of exchange ever existed or was known "among merchants as a negotiable instrument."

Whatever weight, then, *Carlon vs. Kenealy*, with such an uncertain history and such uncertain support, may have in English courts,

it can scarcely be regarded as a valuable authority for the foundation or application of a principle in this. Other cases involving similar paper appear in the books presenting the question as to its assignability under a particular statute, the right of a transferee to maintain an action in his own name, the fact as to whether the instrument was due and other similar matters having nothing to do with the character of the instrument as negotiable paper in the commercial sense and not even suggesting the question. They are of no value as authorities here one way or the other.

Opposed to the theory, however, that instruments promising to pay a definite sum of money at a specified time when coupled with an agreement that they may or shall become due upon the happening of some uncertain event before the date mentioned are negotiable, are many well considered authorities, all of which enunciate the principle that such additional agreement operates to make the time when payment will become due so indefinite and uncertain as to nullify the otherwise negotiable character of the paper, reducing it to a mere chose in action assignable only subject to equities between the original parties.

Thus in *Hubbard vs. Mosely, 11 Gray 170*, it was held that a note payable ninety days after date, with a provision that as soon as the amount of $500 should be received by the payee the notes should be given up, was held not negotiable.

In *Way vs. Smith, 111 Mass. 523*, a note payable four months after date, with a provision, "it is agreed that the note may be paid at any time before maturity, and that 18 per cent per annum shall be deducted till due," was held non-negotiable, the amount to be paid and the time of payment being uncertain and contingent.

In *Stultz vs. Silva, 119 Mass. 137*, a note promising to pay a sum certain a year and a half after date, "or sooner at the option of the mortgagor, with interest during said term," was held non-negotiable. The court says, page 139: "The principal sum is to be

"paid either at the time specified or at any earlier time that the "mortgagor may elect. The interest is to be computed only until "the note is paid. Both the time of the payment of the principal and "the amount of interest are uncertain, and depend upon the "election of the mortgagor. * * * Not being a promise to pay "a fixed sum at a definite time, it lacks the essential quality of a "promissory note."

In *Mahoney vs. Fitzpatrick, 133 Mass. 151*, a note payable "on demand or in three years from this date," was held not negotiable.

Brooks vs. Hargreaves, 21 Mich. 254 (1870), was an action upon a note conditioned for payment of a sum named one year after date, and also containing a provision, "this to be paid when any dividends shall be declared on certain stocks," etc. The court says that whether the meaning of the note be that it was intended to give credit for one year and require no payment at all until a dividend should be declared, or to be payable, at all events, in one year but in case dividends were declared sooner, then it was to be payable at once upon such declaration, "either of these constructions renders the "time of payment uncertain. If in any contingency the note could "be demanded within a year it would be as objectionable as if not "demanded until beyond the year. The declaration of a dividend *in* "*either* case is the criterion, and that cannot be rendered certain "by any evidence in advance. It depends entirely on future action "by the company."

In a recent case in the same state, *First Nat Bank vs. Carson, 60 Mich. 432* (1886), the court applied the same principle to a note which by its terms was payable May 20, 1884, but contained an agreement that in case the property in consideration of which the note was given should be sold or removed from Sanilac it should at once become due. The court say: "A promissory note must be "certain as to the sum to be paid and the time of payment. In this "case the sum is sufficiently certain, but the time of payment is not.

"It is made dependent, until the contract matures, upon the fact of "whether the defendant shall sell or remove the property for which "the contract was made. Such a degree of uncertainty is not "allowable in a promissory note."

In *Bank vs. Bynum, 84 N. C. 24*, the note provided that the payee might declare the note due at any time he considered himself insecure. The court says: "This divests it of the quality of cer- "tainty in the time of payment which, as has been shown, is one of "the essential elements of negotiability. The time of the payment "may be hastened at the option of the payee, and is, therefore, un- "certain."

In *Chouteau vs. Allen, 70 Mo. 339*, bonds sued on contained a clause, "but the company reserve the right to pay the same at any "time to be named by them by adding to the principal sum an "amount equal to 20 per cent thereof."

The court, Sherwood, C. J., says: "Any contingency either as "to the amount to be paid or as to the time when payment is to "occur robs the paper of that certainty which is one of the chief "essentials of negotiability. * * * In the present instance it is "obvious that it depends upon the exercise of the reserved option "of the maker, * * *. so that the time of payment depends not "upon the face of the paper but upon the option of the maker."

So in the present case the time of payment depends upon the action of the maker; if he makes no default as to either of the other 24 notes, it is four months from date; if within that time he makes default as to either, then immediately upon such default.

See also, having bearing on the subject:

Lamb vs. Story, 45 Mich. 488.
Smith vs. Van Blarcom, Ibid, 371.
Nunez vs. Dautel, 19 Wall. 561.
Smith vs. Marland, 59 Iowa, 645.
Cayuga Co. Bank vs. Purdy, 56 Mich. 6.

While it is apparent from examination of authorities that there has been a diversity of opinion in some cases as to just what contingency as to time of payment will affect the negotiable character of the instrument, we think those cases will be found supported by the better logic and sounder reason that exclude from classification as negotiable, in the technical sense, paper which though it may by its terms be ultimately payable at a definite and certain day, is still hampered and made uncertain as to the exact due date, by an additional provision that upon the happening of a particular event, it shall be payable before. The effect of such agreements in practically destroying the value of some of the most essential attributes of negotiability are plainly apparent where as in the present case the agreement is such as to make the note become absolutely due at a time, and by reason of the happening of an event, of which the holder may have no possible knowledge or notice, or even means of knowledge, and being in ignorance of the due date may be unable to make due presentment or give proper notice to those who may be liable to him as indorsers and upon the faith of whose indorsement he may have principally relied in taking the paper. In the case of notes payable at sight, on demand, or a certain number of days after either event, or where the whole amount becomes due on default as to an installment, the holder is not placed in any such position, for he, in all such cases, presumptively has knowledge or means of knowledge of the happening of the event that fixes the time of payment.

In the present case, however, the due date during the four months may become fixed by the contingency of default as to either one of 24 other notes that have nothing in common with one of those sued upon except that they may bear the same date, are for the same amount, and are expressed to have been given for the same consideration. They may be payable on demand, at sight, or one or more days after date, payable at a time and place different from the ones here in dispute, or surrounded with other and more burdensome conditions of all of which the holders of these notes are ignorant. The

notes of the series may be held by 25 different persons each living in a different state, each ignorant of the location or ownership of any other of the series, and yet all liable to become due by default on any one of them. The holder of these notes has no possible means of determining by inspection of the instrument, or from any means that may be at its command, at what time during the period of four months the notes may become due. It may well be said that paper liable to become payable upon such contingencies is lacking in the essential elements of certainty as to time of payment requisite to make it negotiable.

Can anyone point to an instance where by the custom of merchants a bill of exchange so hampered as to time of payment was held negotiable, or doubt that they would by such custom be regarded as not negotiable? The statute of Anne, and other similar statutes in this country, including that of Illinois, have in these particulars not attempted to do more than extend to promissory notes the privileges belonging to bills of exchange by the custom of merchants. If the reason for a certain due date is that it is essential to ascertain the value of the paper from an inspection thereof, the provision in these notes makes the due date uncertain for this purpose; if it be for the benefit of the holder, that he may be able to make presentment and give notice of dishonor, the provisions frustrate that purpose.

The notes in question are not like those considered in *Colehan vs. Cooke* and cases upon which that case rests, which furnish the ordinary text-book definition of what is sufficient statement of certainty as to time of payment, due at a certain specified time, determinable upon a certain event, uncertain only as to the exact time of its occurrence, but are liable at any time during the four months to become due by the happening of a contingency as to either one of twenty-four other similar obligations, which contingency may or may not happen. There is no objection to parties making contracts of this character if they so desire, but well settled principles relating to negotiable instruments, and which form the

foundation of the peculiar privileges that attend that class of paper, should not, we insist, be strained to the point of destruction for the purpose of including cases like the present, beyond both the letter and spirit of the rules. The requirements as to negotiable paper should be in the present as in the past simple and certain, and their peculiar privileges confined within the proper limits. The fact that the transfer of choses in action has been facilitated by modern practice and legislation affords no reason for extending by judicial construction to those who may see fit to deal in that class of property the same rights and privileges in connection therewith that pertain to a *bona fide* indorsee of a bill of exchange by the custom of merchants, or a like indorsee of a promissory note under the statute of Anne.

II.

The instruments in question were not negotiable promissory notes, but merely executory agreements evidencing the terms and conditions of a conditional sale of personal property, as such assignable, but not negotiable in the commercial sense.

It is a cardinal principle in the law of negotiable paper needing no authorities in its support that bills and notes must be for the payment of money absolutely at the time specified, and with nothing upon the face of the paper that expressly or by implication will alter or modify this absolute obligation; and if the instrument, though otherwise a good promissory note or bill of exchange, does contain any such matter, the additional provisions will destroy the negotiable character that might otherwise attach to the instrument and reduce it to the level of an ordinary agreement.

So, too, if a note contains any stipulation or provision creating any obligation, duty or right on the part of either party aside from the simple obligation to pay a fixed sum at a certain time on the one part, and the right to receive it on the other, its negotiability will

be thereby destroyed, and its character changed from that of a note to a mere agreement.

Parson's Bills and Notes, p. 30.
Chitty on Bills, 12 Am. Ed. 134 et seq.
Story on Bills, §§ 4–47.

The statute of Illinois does not change the ordinary rules further than to allow a note to be payable in personal property as well as money.

These cardinal principles are undisputed, and the only difficulty that has ever arisen has been in their application.

They have been held frequently not to extend to a mere recital of the consideration for a note or bill, nor to some merely collateral agreement that was independent of the obligation to pay or the consideration for which the promise to pay was given. Thus it has been held that a recital in a note that certain collaterals had been given as security for its payment, with provisions as to the manner of enforcing such security, were of the latter class, and did not destroy the negotiable character of the instrument; but in such cases it will be found upon examination that the security was independent of any obligation to pay created by the note, and did not control it in any way whatever. Further than this we do not think the authorities will go.

The rule is well stated by Gibson J. in the leading case of *Overton vs. Tyler, 1 Am. Leading Cases, 365*, where a power of attorney contained in a note authorizing a confession of judgment thereon was held to destroy its negotiable character. He says:

"A negotiable bill or note is a courier without luggage. It is "requisite that it be framed in the fewest possible words, and those "importing the most certain and precise contract, and though this "requisite be a minor one it is entitled to weight in determining a "question of intention. To be within the statute it must be free "from contingencies or conditions that would embarass its course, "for a memorandum to control it though endorsed on it, would be

"incorporated with it and destroy it. But a memorandum that is "merely directory or collateral will not affect it."

In the present case each instrument contains in addition to the promise to pay and the modifying provision as to time of payment, the statement that the note is one of a series of 25, all of which are to become due upon default as to any one, the further statement that they are given for the purchase price of certain railway freight cars manufactured by the person named as payee, and by it sold to the maker, the title to which cars it is agreed shall remain in the vendor until all the notes of the series, principal and interest, are paid in full. Here is clearly luggage enough to destroy what might otherwise be the negotiable character of any instrument. The paper shows that the promise to pay the amount specified is coupled with a corresponding mutual dependent obligation on the part of the payee upon such payment to deliver title to the property described, which, until such payment, is to remain in such payee subject to all contingencies as to its destruction in the meantime and the inability of such payee or vendor, for any cause, to deliver the title or possession of the property when payment is by the terms of the instrument to be made. The transfer of the title is to be the consideration for the payment so promised to be made. If payment is not made as agreed the vendor is not obliged to transfer the title to the property, and on the other hand if for any reason when the time of payment comes the property is not in existence or cannot be transferred, the obligation to pay is at an end. The promise to pay is in no sense an absolute unqualified obligation, but subject always to the contingency that the property will be delivered when the payment is made, and the agreement, though unilateral in form, imports obligations on the part of the vendor as well as the vendee—obligations that are mutual and dependent in their character, not absolute and unconditional. The maker of the so-called note gets nothing until he pays for it, for it is the expressed intention that nothing shall pass to him until then, and any person taking such paper at any time does so with full notice of all the terms and obligations ex-

pressed therein or to be implied therefrom, among which is the one that the so-called maker, the conditional vendee, is not obligated to pay unless he also receives the property for the purchase price of which the note is given; a condition that is incidental to all cases of conditional sales. That instruments of the character of those in question here evidence a conditional sale by which no title passes until conditions are performed rather than an absolute sale with mortgage back for the purchase price, was held by this court in the recent case of *Harkness vs. Russell, 118 U. S. 663*, where in an exhaustive decision considering an instrument very similar in its provisions to those in question in the present case, it reviews nearly all the authorities in this country on the subject.

While in that case, as well as many others where this class of papers has come up, the question was as to the title to the property acquired by the maker of the instrument, and the holding that, prior to compliance with the conditions, he had none whatever, regardless of where the possession might be, it follows as a logical sequence that his final obligation to pay must be dependent upon his getting what forms the consideration for the promise, otherwise there is an absolute want or failure of consideration. Until the executory agreement is performed, and the conditions fulfilled or waived, there is a contingency, it may be more or less remote, that the property may be destroyed or the vendor incapacitated from performance when the time for performance arrives. The obligation to pay is affected by this contingency from the time the agreement is made, and is not changed by its subsequent transfer.

The first case with reference to paper containing stipulations such as are embodied in that here involved, and presenting the question as to the negotiable character of such paper, seems to have been that of *Third Nat. Bank vs. Armstrong, 25 Minn. 530* (1879), where the court, unhampered by authority, was not slow to apply the rule which on principle would seem undisputable. They say:

"The promise of payment and the implied promise to transfer the "title were mutual, and as each was the sole consideration for the "other, and both were to be performed at the same time, they were

"concurrent conditions of the same agreement in the nature of "mutual conditions precedent, so that inability or refusal to perform "the one would excuse performance of the other. *Benjamin on* "*Sales*, *451–480*. If, prior to any default on the part of the de- "fendant, the company had retaken possession of the property and "disposed of it so that upon maturity of the defendant's obligation "an observance of the condition on its part had become impossible, "there can be no doubt that under such circumstances no action "could have been maintained against him on his promise. An "obligation of this character is altogether too uncertain to serve the "purpose of commercial paper as the representative of money in "business transactions. It carries into the hands of every holder "notice of the existence of a condition that may result in defeating "any recovery upon it, and therefore cannot have accorded to it "the privileges attaching to that kind of paper."

A somewhat similar case came before the Supreme Court of Massachusetts in 1883 in *Sloan vs. McCarty*, *134 Mass. 245*, an action brought upon an instrument which was in the following form, viz.:

"85 00. RUTLAND, April 5, 1874.

"Received of T. S. Sloan this day, roan horse known as A. M. "Brown horse, for which I promise to pay T. S. Sloan or order "eighty-five dollars one month from date, at the Leicester—*said* "*horse to be and remain the entire and absolute property of the said* "*Sloan until paid for in full by me.*"

The signature was witnessed, and the question was whether it was affected by the Massachusetts statute of limitations that excepted from its operation promissory notes signed in the presence of an attesting witness. The court *held* the instrument not a promissory note, saying: "The contract also contains an agreement that "the horse shall remain the property of the plaintiff till paid for in "full by the defendant. This is not an agreement relating to the "manner in which the promise to pay money may be enforced, but "is a substantive agreement. The whole contract describes a con-

"ditional sale of a horse. If the money were not paid by the de-"fendant at the time specified the plaintiff could, if he chose, "rescind this conditional sale, and the defendant would then have "no right to the horse and would no longer be liable to pay the "note. If the plaintiff should insist upon the performance of his "promise by the defendant, the obligation of the defendant is in legal "effect conditioned upon the title to the horse vesting in him when "the money is paid in full, and this condition appears on the face "of the contract.

"The contract contemplates that the payment of the money by "the defendant and the transfer of the title to the horse should be "simultaneous acts; and if the horse should die, for example, within "the month without fault on the part of the defendant, the plaintiff "would be disabled from transferring the title and could not "maintain an action. *Swallow vs. Emery, 111 Mass. 355.* The "contract is something more than a promise to pay money, is not a "promise to pay it absolutely and at all events, and therefore the "contract is not a promissory note."

To same effect see also

Killam vs. Schoeps, 26 Kans. 310.
South Bend Iron Works vs. Paddock, 37 Kans. 510.
Stevens vs. Johnson, 28 Minn. 172.
Deering vs. Thom, 29 Minn. 120.
Fletcher vs. Thompson, 55 N. H. 308.
Bannister vs. Rouse, 44 Mich. 428.

Apparently opposed to this application of the rule is *Mott vs. Havana Bank, 22 Hun. 355,* a case that does not consider the question but is rested wholly upon some prior decisions in the same state that do not decide the question nor justify the deductions drawn—

Heard vs. Dubuque Co. Bank, 8 Neb. 10, where the court distinctly recognizes the principle but takes the note then before it out of its application for the reason that it did not appear therefrom that the property; the title to which was reserved to the payee, was

the consideration for the note; and *Newton Wagon Co. vs. Diers, 10 Neb. 284*, where the matter is summarily disposed of without argument, and the note held negotiable upon the construction that the added stipulation was a mere statement of the consideration.

Upon principle, however, there can be no question as to the correct rule to be applied upon this point, and authorities where the question has been well or fairly considered are in entire harmony with our position here. The parties to these instruments in concise but unmistakable terms announce that the transaction with reference to the cars was intended as a conditional sale only, and the reciprocal obligation implied from such relation follows as a natural sequence. This was the character of the transaction at the time it was entered into and the paper signed. It was not changed by anything subsequent, and could not be changed by a mere transfer of the right to receive the payment promised, for the transferee could only take the beneficial interest in the promise to pay, incumbered with and subject to the reciprocal obligation of the vendor to the vendee, of all which the paper gave full notice.

Had the transaction been in the nature of sale absolute, with mortgage back to secure deferred payments, the instruments might be said to come within the authorities holding that the negotiable character of promissory notes is not to be affected by an agreement that is merely collateral to the promise to pay. But here the parties have by the express terms of their agreement evidenced a positive intention that the title should not pass until all the conditions of payment were fully complied with, and there is nothing in the instruments that will operate to modify or change this positive intention so expressed.

See *Call vs. Seymour, 40 Ohio St. 670.*
Fosdick vs. Schall, 99 U. S. 235.
Harkness vs. Russell, 118 U. S. 663, and cases cited.
Dom. Sew. M. Co. vs. Arthurhultz, 63 Ind. 322.
Cole vs. Mann, 62 N. Y. 1.

The expression that the notes are equally and ratably secured upon all the cars does not change the character of the transaction from that of a conditional sale to an absolute sale and mortgage back any more than the words "to order" make an instrument a promissory note. They are in entire harmony with what precedes them, that is, that the title to all the property is to remain in the vendor until all the notes, principal and interest, are paid in full; and further evidence an intent that a payment of a part of the purchase price of the 250 cars should not in any event operate to entitle the vendee to any of them, but that for the purposes of the transaction the aggregated lot of cars shall be treated as an entirety, not to be divided in any way by reason of the payment of any proportion of the entire purchase price.

The ultimate object on the part of the vendor in such cases is undoubtedly to secure to himself the payment of the agreed purchase price, and he may do this in any way that may be agreed upon; either by a conditional sale retaining the ownership with or without the possession until all the conditions are complied with and full payment made, or by an absolute sale and transfer of the title with a mortgage back; and no matter what the form of the instrument the question is one of intention, as evidenced by the instrument itself.

Hervey vs. R. I. Locomotive Works, 93 U. S. 664.
Murch vs. Wright, 46 Ill. 487.
Fosdick vs. Schall, 99 U. S. 235.
Call vs. Seymour, 40 Ohio St. 670.
Harkness vs. Russell, 118 U. S. 663.

As this is not a question between claimants of the property sold, the chattel mortgage act of Illinois cannot affect the matter one way or the other.

The Illinois statute on negotiable instruments does not interfere with either of the positions taken herein.

Section 3, Ch. 98, Illinois Statutes, provides: "That all prom-"issory notes, bonds, due bills or other instruments in writing,

"made or to be made by any person * * whereby such "person agrees to pay any sum of money or article of personal "property * * shall by virtue thereof be taken to be due "and payable as therein expressed."

Section 4 provides: "Any such note, bond, bill, or other instru- "ment in writing, made payable to any person as payee therein, "shall be assignable by indorsement thereon, under the hand of "such person and of his assignee, *in the same manner as bills of* "*exchange*, so as absolutely to transfer and vest the property there- "of in each and every assignee successively."

And in several cases determined by the supreme court of that State, it has been held that to come within the operation of the statute the promise must be an absolute and unconditional one.

See *Husband vs. Epling*, *81 Ill. 172*.
Turner vs. P. & S. R. R. Co., *95 Ill. 145*.
Canadian Bank vs. McCrea, *106 Ill. 281*.

The statute is very different from that under which *Howard vs. Simpkins*, *70 Geo. 322*, was decided.

Where an instrument is not negotiable at common law, a statute that it may be negotiated the same as a bill of exchange does not relate to anything but the manner of transfer, that is, by indorsement. It does not by virtue of such statute become, in the hands of an endorsee, clothed with the peculiar privileges belonging to bills of exchange (*Shaw vs. Railroad Co.*, *101 U. S. 557*), but such indorsee takes it in the same manner that he would a promissory note past due; that is, subject to the same defences that might be interposed were the action between the original parties.

The defendant in error in the present case rested its cause upon its right to have the benefit of a technical rule of commercial law that is applicable alone to negotiable instruments proper. It took this paper with full knowledge of its character and liability to the contingencies herein suggested. It knew not only that the time of payment was uncertain, but that the obligation to pay at all was sub-

ject to a contingency that might absolutely destroy it, and unless the paper in question can be said to come clearly within the class privileged, the plaintiff in error should not be deprived of the benefit of a meritorious defence. No wrong will be done the commercial world by confining the peculiar privileges of negotiable paper to obligations that clearly conform to all the essentials of that class as defined by the custom of merchants or the statute of Anne, nor special good conferred by so broadening the application of the rules as to include as negotiable paper instruments of the character of those here involved. Such result cannot be obtained without a practical obliteration of the ancient landmarks of certainty as to time of payment and unconditional obligation to pay.

Upon either of the grounds here suggested we insist that the rulings of the trial court were erroneous, and the judgment should be reversed.

GREENLEAF CLARK,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1889.

—NO. 64.—

THE CHICAGO RAILWAY EQUIPMENT COMPANY,
Plaintiff in Error,

vs.

THE MERCHANTS NATIONAL BANK OF CHICAGO,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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CHARLES NOBLE GREGORY,
Of Counsel.

DEMOCRAT PRINTING COMPANY, PRINTERS, MADISON, WIS.

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Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

This action was brought in the Circuit Court of the United States, for the Western District of Wisconsin, for the collection of two promissory notes, differing only in date, of one of which the following is a copy:

"$5,000. CHICAGO, ILL., January 20, A. D. 1884.

"For value received, four months after date, the Chicago "Railway Equipment Company promise to pay to the order "of the Northwestern Manufacturing & Car Company, of "Stillwater, Minn., five thousand dollars, at First National "Bank of Chicago, Ill., with interest thereon at the rate of "— per cent. per annum from date until paid.

"This note is one of a series of twenty-five notes, of even "date herewith, of the sum of five thousand dollars each, and "shall become due and payable to the holder, on failure of

"the maker to pay the principal and interest of any one of "the notes of said series, and all of said notes are given for "the purchase price of two hundred and fifty railway freight "cars manufactured by the payee hereof, and sold by said "payee to the maker hereof, which cars are numbered from "13,000 to 13,249, inclusive, and marked on the side thereof: "with the words and letters, Blue Line, C. & E. I. R. R. Co., "and it is agreed by the maker hereof, that the title to said "cars shall remain in the said payee until all the notes of "said series, both principal and interest, are fully paid, all "of said notes being equally and ratably secured on said "cars.

"No. 1. GEO. B. BURROWS,
Vice President.

"Countersigned by
E. D. BUFFINGTON,
Treas.

Endorsed: Northwestern M'f'g. Car Co., per J. C. O'Gorman, Treas.

The notes were purchased before due for full value by the defendant in error without any notice, extrinsic from the face of the instruments, of want of consideration or of any defects or defenses.

The defense was:

That the instruments in question were not negotiable, and that there was no consideration for them, and that they were signed in blank and never delivered by the defendant, and that they were not in form the obligation of the defendant corporation.

The proof was that the signatures to the notes were those of the vice-president and counter signatures, those of the treasurer of the defendant corporation.

That the notes were purchased by plaintiff at five and a half per cent. discount, merely for the time that they had to run without notice of any equities, and before due.

That the notes were endorsed by the treasurer of the payee, the N. W. Man. & Car Co.

That the treasurer of the defendant company countersigned the notes was proved further by his direct testimony.

The defendant sought to prove on cross examination of Buffington, treasurer of defendant company, and of the officer who countersigned the notes, O'Gorman, treasurer of the Northwestern Manf. & Car Co., and as such endorser of the notes in question, that the notes were signed in blank, and that there was no consideration, and that the officers who signed the notes attached their signatures without authority, and did not sign as officers of the corporation defendant.

The trial court sustained objections to these questions and offers of evidence.

The articles of organization of the defendant company, were placed in evidence by plaintiff (See p. 19, record), showing that the business of the company was "buying, holding, selling, leasing, hiring and generally dealing in railway cars," etc.

It was set up in the amended answer of the defendant (Record, p. 9), that the defendant company had actually purchased and received 500 cars of the payee of these notes, the Northwestern Manufacturing & Car Company, and had actually executed instruments similar to those in suit for the price of such cars, and had paid them, before maturity.

And the issuing of these instruments anterior in date but similar otherwise, is alleged as the *act of the defendant company* and they were paid by the *company* as appears by the allegations of such amended answer.

Objection to much of the defendant's evidence having been sustained, the defendant rested.

The plaintiff then proved the amount due on the notes in suit.

Counsel for plaintiff then moved the court to direct a verdict for plaintiff which was, after extended argument, ordered.

There were exceptions by defendant, and a motion for a new trial which was denied, and a writ of error was thereupon sued out by said Chicago Railway Equipment Co. herein to review these proceedings.

ARGUMENT.

We confine our argument strictly to the question discussed in the brief of counsel for plaintiff in error, namely, the negotiability of the instruments in suit.

On page 6 of that brief, it is expressly stated that this is the only question at issue, the following language being used:

"The correctness of the rulings of the court below in the matter of the several errors assigned, is dependent upon the character of the instruments sued upon, and upon whether they are to be regarded as negotiable paper in the technical commercial sense of that term." And again, upon the same page: "The issue is a simple one, the defendant in error claiming that they are negotiable promissory notes; the plaintiff in error that they are not."

The notes sued on are negotiable instruments under the law merchant and ENTITLED TO THE PROTECTION ACCORDED SUCH PAPER IN THE HANDS OF INNOCENT PURCHASERS FOR VALUE BEFORE DUE.

They are unconditional open promises in writing to pay a fixed sum of money at a time certain to arrive, and there is no additional contract except as "incidental and ancillary to the main engagement, intended to assure its performance, or to compensate for trouble and expense entailed by its breach."

1. Daniels on Neg. Inst., § 62 a (3d edit.).
   National Bank v. Gary, 18 South Carolina, 282, which quotes and approves Daniels as above.

And see Daniels, § 1 to 63 for a full review of the decisions relative to the essentials of negotiable instruments.

1.

THE TAKING OF COLLATERAL SECURITY AND INCORPORATING IT IN A NOTE DOES NOT AFFECT ITS NEGOTIABILITY, EVEN WHEN POWER TO SELL THE SECURITY IS GIVEN. SUCH NOTES WERE HELD NEGOTIABLE AS OF COURSE.

Wise v. Charlton, 4 Ad. and El., 786.
Fancourt v. Thorne, 9 Queens Bench, 312.
Perry v. Bigelow, 128 Mass., 129.
Towne v. Rice, 122 Mass., 67.
Knipper v. Chase, 7 Clark (Iowa), 145.
Bank of Carroll v. Taylor, 67 Iowa, 572. Decided Dec. 12, 1885.
Charleston Bank v. Gary, 18 S. C., 282.
Arnold v. Rock River U. V. R. R. Co., 5 Duer, 207.
1 Story on Prom. Notes, § 17, see note 3, (7th ed.).

In *Wise v. Charlton*, 4 Ad. & El., 786. There was a note in usual form to which was added: "And I have deposited in his hands title deeds to lands purchased from the devisees of William Toplis as a collateral security for the same."

It was claimed that it was not a promissory note on this account, and that it was not stamped properly.

Lord DENMAN, C. J., said: "With respect to the admissibility of the note in evidence, if it be a promissory note, the stamp is right, and there is nothing to qualify its character. There is only a memorandum added of something else; but that is not imported into the main agreement.

PATTERSON, J.: "This is not the less a promissory note, from its being also an agreement of another kind."

COLERIDGE, J.: "If this is a promissory note, no difficulty remains. It is not the less a promissory note from a memorandum of another kind being added, importing that a collateral security has also been given."

And accordingly the court, after consideration, refused the rule to show cause why a nonsuit should not be granted.

Fancourt v. Thorne, 9 Queen's Bench, 312, is to like effect.

In *Perry v. Bigelow*, 128 Mass., 129 supra:

Where an instrument in the usual form of a promissory note contained the following agreement in addition: "I having deposited with him as collateral security the following described certificates (describing them), and hereby authorize him to sell the same at public or private sale or otherwise at his option, on the non-performance of this promise without notice, and authorize him to use, transfer or hypothecate the same at his option, he being required, on payment of the amount loaned as specified herein, and at any time before said collateral security shall have been sold, to surrender the same," the supreme court of Massachusetts held that, "The defendant's written contract was a negotiable promissory note," without debate.

In *Towne v. Rice*, 122 Mass., 67 supra, the same court held, we quote the syllabus:

"An instrument which in its terms and form is a negotiable promissory note, does not lose that character because it also recites that an additional rate of interest will be paid 'after due,' that the maker has deposited certain certificates as collateral security for the payment of the note, and states the terms upon which they have been deposited and upon which they may be sold by the holder on the non-payment of the note."

In *Knipper v. Chase*, 7 Clarke (Iowa), 145: An instrument in the following form was declared a promissory note: $5,000. On the first day of April, 1857, for value received, I promise to pay Decker & Knipper, or order, five thousand dollars and ten per cent. interest, and for the security of the payment of the same, I have left with them, the said Decker & Knipper, six Louisa county (of Iowa) bonds, Nos. 81, 82, 84, 85, 86 and 87, for one thousand dol-

lars each, and do *hereby authorize* them to sell said bonds at their market value; said value, however, in no case to be less than eighty (80) per cent. on the principal and interest accrued previous to sale, and apply the proceeds thereof to the payment of the above amount; and it is agreed that in case the said Chase fails to pay the said five thousand dollars and interest at maturity, then the said collateral shall be forfeited therefor to said Decker & Knipper, or the said Decker & Knipper may at their option return said bonds to said Chase and commence suit against him."

There was a demurrer on the ground that the writing was not a promissory note but an agreement, and that there was no averment of compliance or of the return of the bonds.

The court held it "well declared upon as a promissory note," that the annexed agreement no more altered it than if in a separate instrument, and the demurrer was therefore overruled.

In *Bank of Carroll v. Taylor*, 67 Iowa, 572, it was held that a promissory note given for the purchase of a drill was not made non-negotiable by a condition incorporated in it that "in case of failure to pay the amount due thereon at maturity, or whenever the holder may deem himself insecure, then he may take said property by virtue of the mortgage and sell the same at public auction as by law provided, the proceeds of sale, after deducting all expenses, to be applied on the note and mortgage, and the residue, if any, to be returned to the maker."

National Bank v. Gary, 18 S. C., 282, holds that a note similar to that considered in 7th Clark, *supra*, containing even more ample and precise directions as to the sale of the collateral security and which "hereby gives the said M. W. Gary authority to sell," etc., is, on the weight of authority, a negotiable instrument. The court particularly quote and rely on Story on Prom. Notes and Daniels on Neg. Inst., as supporting the views announced.

In *Arnold v. Rock River Valley Union R. R. Co.*, 5 Duer., 207, the syllabus is as follows:

"An instrument which, in its terms and form, is a negotiable promissory note, does not lose that character because it also states that the maker has deposited bonds as collateral security for its payment, and that he agrees, on nonpayment of the note at maturity, that they may be sold in a manner and upon a notice specified, and he will pay any deficiency necessary to satisfy the note and the expenses of such sale."

"The whole sum named, being made payable to order on a day certain, in money, and absolutely, and the collateral contract, relating solely to the money promised to be paid, and being in addition to the principal contract, and not in terms or legal effect a modification of it, the note, as to the sum promised to be paid absolutely, is negotiable, and the endorser of it may be charged and prosecuted as endorsers of negotiable paper."

And the court lays stress (this decision was in 1856) on the fact that "instruments like the present are of common use," and that indorsers of them intended to incur the liabilities of endorsers of commercial paper. All this is vastly more true in the present day, when the decisions of numerous courts have given credit to the use of notes in form similar to those in suit, and when they are of almost universal acceptance at banks and commercial centers as commercial paper.

In *Collins v. Bradbury*, 64 Maine, 37, the following was held a negotiable note:

"FORT FAIRFIELD, June 24, 1869.

"For value received, I promise to pay Joseph Chandler "or order, ninety dollars, one-half of which to be paid in "March next, the remainder in September next after, with "interest. Said promise made for a colt this day taken, "said colt holden for payment of said amount."

And a note given for an agricultural machine with a similar condition was held negotiable.

Heard v. Dubuque Bank, 8 Nebraska, 10.

We are not aware that this court has passed directly upon the question of whether or not, including an agreement for security in an instrument otherwise negotiable would destroy its negotiability, but in *Marine & River, Phosphate Mining & Manufacturing Co. v. Bradley*, 105 U. S., 175, an instrument for the payment of money which was made a lien by its terms on all the property of the corporation was in suit and its negotiability was much discussed and it was held originally non-negotiable merely for want of words of negotiability, but on an extension, the endorsement added by the maker, having contained words of negotiability, it was held that the endorsed bond became negotiable.

2.

A STATEMENT OF THE CONSIDERATION IN THE NOTE DOES NOT AFFECT THE NEGOTIABILITY OF THE NOTE, NOR PUT A PURCHASER UPON INQUIRY.

Doherty v. Perry, 38 Ind., 15.

Bank of Sherman v. Apperson, 4 Fed. Rep., 25.

Pendleton v. Knickerbocker Life Ins. Co., 7 Fed. R., 169.

First Nat'l Bank v. Michael, 96 North Car., 53.

3.

A STATEMENT OF A PROPERTY CONSIDERATION IN A NOTE, AND THAT SUCH PROPERTY SHOULD REMAIN THE PROPERTY OF THE ORIGINAL OWNER UNTIL THE NOTE IS PAID, DOES NOT AFFECT ITS NEGOTIABILITY.

See *Mott v. Havana Nat. Bank*, 22 Hunn. (N. Y.), 354.

In that case a note in the following form was held negotiable:

"$450. NEW YORK, October 15, 1875.

"Fourteen and one-half months after date I promise to pay to the order of the American Engine Company $450, at seven per centum, at the Havana National Bank at Havana, N. Y., value received, being in part payment for a portable engine, which engine shall be and remain the property of the owner of this note, until the amount hereby secured is fully paid. FRED. L. NIGHTHART."

The court (page 356), says of this instrument:

"The note in this case was an agreement to pay the money specified in it to a certain payee, on a day certain, and contained all the requisites of a negotiable promissory note; and the addition of the statement of the consideration to-wit: the engine, with the statement that it was to remain the property of the owner until the note was paid, did not render it non-negotiable."

So a note payable to order at a day and in a sum certain, stating that it was given for a buggy and harness, "upon the distinct understanding that the title was not to pass until paid for in full," was held negotiable, and that the purchaser was not put on inquiry as to any defense between the original parties.

Howard v. Simkins, 70 Georgia, 322.

Howard v. Simkins, 69 Georgia, 773.

This case is peculiarly in point and proceeds in reference to a statute as to negotiable instruments in substance like that of Illinois, where the notes in suit bear date and were negotiated and are payable.

The defense was that the instruments were not negotiable; that both notes were given for the same consideration, the last in place of the first, on the representation of the payee that he had lost the first, and that the consideration had failed in that the payee had taken back the buggy, under the terms of the contract on the face of the notes."

The court holds them negotiable and (suit being by an innocent purchaser) proceeds: (70 Ga., p 324.) "Is there notice here to affect this holder? None is pretended, except what appears on the face of the instruments. That only affects a reservation of title to the buggy until the note is paid. It reserves a right to the payee, none to the maker. They bind themselves to pay the money at maturity, in any event. He reserves the title to the buggy as a security until all that becomes due is paid. Such a reservation puts no purchaser of the negotiable instrument on notice of any sort of defense to it, for none is hinted at in the paper."

And a note containing this clause was held negotiable by the supreme court of Nebraska: "The express condition of the sale and purchase of the wagon for which this note is given, is such that the title, ownership or possession does not pass from, but shall remain in said Newton Wagon Co. until this note and interest is paid in full."

Newton Wagon Co. v. Diers, 10 Nebraska, 284.

4.

NOR WILL THE FACT THAT THE MAIN CONSIDERATION OF THE NOTE IS FUTURE, AFFECT ITS NEGOTIABILITY SO LONG AS THE PROMISE TO PAY IS CERTAIN AND NOT CONTINGENT.

Thus, in the case of *Stat. Nat. Bank v. Cason* (La.) 2 Southern, 881. It was held that the circumstance that the consideration of a note was to be thereafter realized, or that from some contingency it might never be enjoyed, did not affect its negotiability, and that even though a purchaser before due knew that the consideration was future and contingent, and that there might be offsets against it, this would not make him liable to the equities between the original parties. That action was upon a note for $2,800 given as collateral security to Gidiere, Day & Co., who were to furnish plantation supplies to one of the parties thereto. Gidiere, Day & Co. failed in business when they had but partially performed their contract. The note had been sold before this and before maturity to the plaintiff bank, but the bank was, at the time of the transfer, informed of the consideration of the note.

The court in giving its opinion relies on the earlier decision of *Sadler v. White*, 14 La. Ann., 177, quoting from it this passage: "Plaintiff received the note before maturity and before a failure of the consideration, even if it was known to him taking it, that the consideration was future and contingent and that there might be offsets against it, this would not make him liable to the equities between defendant and payee."

This case of *Sadler v. White* so quoted and relied on was an action on a note for $350, given by White for future rent of a hotel leased to him. The lessor's title was sold out by the sheriff and White was compelled to pay rent for the term covered by the note to the purchaser at the foreclosure sale. The note, however, before failure of title, had been

negotiated for value to the plaintiff who took with full notice of the consideration. The court held as above and continued thus as to the failure of consideration which was set up in defense: "If such were a sufficient defense it "would destroy materially the negotiability of notes, for in "almost every case of the purchase of a note, the buyer "knows there might be equities between the original par-"ties to the same.

"It can not affect the negotiability of a note that its consideration is to be hereafter realized, or that from some contingency, it may never be enjoyed. Any one having sufficient confidence in another to give his written obligation for something to be given or enjoyed hereafter, is at liberty to do so and the maker cannot censure any future holder of the note for having purchased it and for seeking to hold him liable, for it was the faith of the maker in the payee that he would execute his promise and allow no obstacles to defeat it, that created the note and gave currency to it," and accordingly the defense was excluded.

And in the same way an instrument whereby A promised to pay to B's order $7.00 five days after date, and $7.00 on the first day of each succeeding month for twelve months from date "for the privilege of advertising purposes for the term of one year from date" was held might properly be declared on as a promissory note.

Chase v. Behrman, 10 Daly (N. Y.), 344.

Hawley v. Bingham, 6 Oregon, 76, is a case closely in point. We quote the syllabus: "B executed his promissory note to H and D, payable January 15, 1876, in the usual form, with the addition of the following words: "The above note is given upon and for the sole consideration that the said Hawley & Dodd have agreed and promised that upon the payment of the said note, at maturity (time being of the essense of the contract), they will sell and transfer to the undersigned, Bingham, the planing machine which they have this day entrusted to him. Held, that the promise of

B, was not dependent on the promise of H and D, to sell and transfer the machine as a condition precedent; but that it was an independent promise to pay," and accordingly the court gave judgment on the note without requiring the plaintiffs to allege or prove the sale and transfer of the machine.

In line with these last cases is the well considered case of *Mabie v. Johnson*, 8 Hun. (N. Y.), 309, where a note in the following form was sued on.

"GUILFORD, Nov. 29, 1870.

"For one Hinckley knitting *machine warranted*, I promise to pay J. H. Wells or bearer, thirty dollars, one year from date with use.

"DANIEL JOHNSON."

The action was by purchaser for value before due, and there was proof permitted on the trial of a warranty and breach as a defense. The county court was reversed for this and the plaintiff was held a bona fide holder so as to deprive the defendant of this defense, and the fact that the consideration of the note on its face appeared to be the machine, and the warranty was held not to put the purchaser on inquiry as to any breach of the warranty. The court says (p. 310): "Giving to the words the broadest meaning "possible they do not imply that there has been a breach "of the warranty, by which the defendant has sustained "damages. They cannot be construed as notice to the pur- "chaser, of a defense to the note in the hands of the payee. "If they do it must be because the law will presume a "breach wherever there is a warranty. That would be "preposterous. There was nothing, therefore, which "showed or tended to show, to the purchaser, or even to ex- "cite his suspicions, that any defense to the note in suit ex- "isted when he purchased it. He is therefore entitled to "protection against defendant's counter claim."

Rooker v. Rooker, 29 Ohio St., 1, is a case which, when examined well, maintains a like doctrine.

In that case, Rooker had delivered to Carpenter certain notes in part payment for a house and lot. Carpenter reserved the title and possession, and merely contracted to deed on further payments being made. The question was, whether Carpenter was an innocent purchaser for value, he having given nothing except a contract to convey title to the property purchased on further payments being made, and having reserved both title and possession (like the notes in the present suit, except that they do not reserve possession). The court, p. 5, says: "The fact, as found by the district court, that under the agreement, Carpenter was to retain the possession of the property sold until the conditions precedent to the execution and delivery of the deed by Carpenter and wife were performed by Hickox does not affect Carpenter's title to the notes in question. He had paid value for the notes by relinquishing a valuable right in the property sold, on the credit thereof," and Carpenter was held entitled to the protection given an innocent purchaser of commercial paper.

It must be remembered that a portion of the contract in every sale of personalty and most sales of realty is executory and must remain so, namely the warranty of title implied in sales of personal property and commonly expressed in conveyances of realty. So that if the theory is to prevail that a note given for a consideration, wholly or partly future, loses its character as commercial paper whenever this fact appears on its face or is known to the purchaser, in so far that equities arising from a failure of the payee to make good his agreement may be set up against the purchaser, and that full performance must be alleged and proved by the plaintiff, then this is true of every note given for personal property or warranted realty, and every holder of the note with notice of its origin, must see to it that the warranty is made good and must allege and prove performance ere he can recover.

5.

The instruments in suit even by their own terms reserve a *lien for security* rather than absolute title. That is plainly their purpose and the reservation of title is refuted and qualified by the recital that the notes are "given for the purchase price of 250 railway freight cars manufactured by the payee thereof *and sold by said payee* to the maker hereof," and the further provision "said notes being equally and rateably *secured* on said cars." (Case, fol. 7.)

It is a reservation or transfer of title by way of security and a mortgage lien only is created.

This court has held an absolute sale and deed of land made as security for money to be merely a mortgage.

Jackson v. Lawrence, 117 U. S., 679.

And the rule is the same in this case of a sale of personal property with title withheld until the notes given for the purchase money "rateably secured on said cars" are paid.

A negotiable note secured by mortgage is still negotiable (although the two are to be construed as one instrument), even when a memorandum of the mortgage appears on the face of the note.

Carpenter v. Lanyan, 16 Wall., 271.
Kennicott v. The Supervisors, 16 Wall., 452.
Swift v. Smith, 102, U. S., 442.
Fisher v. Chandler, 3 Pinney, 78.
Croft v. Brewster, 9 Wis., 503.
Cornell v. Hichens, 11 Wis., 353.
Stillwell v. Kellogg, 14 Wis., 461.
Crosby v. Roub, 16 Wis., 616.

The case of *Carpenter v. Lanyan*, 16 Wall., 271, holds that the note imparts its negotiable character to the mortgage, so that an innocent purchaser of the note takes the mortgage lien discharged from all equities between the orig-

inal parties. The note is the principal contract and the mortgage is merely collateral to it.

If the negotiable character of a note can so powerfully affect the lien of a mortgage of realty not attached to but contemporaneous with it, it is difficult to see why it should not equally affect the far briefer and simpler contract for a lien on personalty, attached to it, which is considered in this case.

We are well aware that the Supreme court of Minnesota, in accordance with the policy of that state which seems to have been always hostile to commercial paper, has held otherwise.

Oster v. Mickley, 35 Minn., 245.

But the decisions of this court must of course prevail.

6.

"A note by which a maker promises absolutely to pay to the order of the payee, a sum certain at a fixed time, such payment not being dependent upon a contingent event nor out of a particular fund, is negotiable," and this character is not destroyed by additional memoranda that the policy for which it is given shall be void in case of default on the note.

Kirk v. Dodge Co. M. Ins. Co., 39 Wis., 138.

Pendleton v. Knickerbocker Life Ins. Co., 7 Fed. Rep., 169.

So a premium note for insurance marked "on policy No. 33" is negotiable, notwithstanding the policy provides for a set-off of the note against loss under the policy.

Taylor v. Curry, 109 Mass., 36.

It will be observed that these cases of notes given for insurance and which refer to the policies on their face, are cases of notes given for executory contracts, for considerations wholly future, and this appearing on their faces, any purchaser took with knowledge, yet their negotiability was held not impaired and the holders were not required to allege and prove performance or solvency and ability to perform on the part of the insurance companies.

7.

If there is doubt as to the negotiability of an instrument, the circumstance that it is made payable to "order" is significant of the intention of the parties to it, and the court will follow that intention and hold it negotiable if possible.

First Nat'l Bank v. Michael, 96 N. C., 53.

8.

AS TO THE TIME OF PAYMENT.

The notes in suit herein are payable at a time certain, namely, each by its terms, "four months after date," but may become due and payable earlier in case of default by the maker on any of the series of notes. They are then certainly due at the expiration of four months. They may be made due at an earlier date by the act (or what is the same thing, default) of the maker.

In this respect they resemble notes payable "on or before" a fixed date. Such notes are due certainly at the date designated, but by the act and by the election of the maker may be treated as due and paid at any earlier date. Yet such notes, namely, those payable on or before a given date, are negotiable.

Ackley School Dist. v. Hall, 113 U. S., p. 135.
Morgan v. U. S., 113 U. S., 476.
Matson v. Marks, 31 Mich., 421.
Jordan v. Tate, 19 Ohio St., 586.
Smith v. Ellis, 29 Me., 422.
1 Daniels on Neg. Inst., § 43.

"A note may be negotiable if payable *certainly* at a fixed time although subject to a contingency under which it may become due earlier."

Ernst v. Steckman, 74 Pa. St., 13.
Cota v. Buck, 7 Metc., 588.
Dobbins v. Oberman, 17 Na., 163.
Newton Wagon Co. v. Diers, 10 Na., 284.
Walker v. Woolen, 54 Indiana, 164.
Woolen v. Ulrich, 64 Indiana, 120.
Cisne v. Chidester, 85 Ills., 523.
Charlton v. Reed, 61 Iowa, 166.
Smith v. Ellis, 29 Me., 422.

In *Ernst v. Steckman*, 74 Pa. St., 13, the court passed upon a note which promised to pay $375 "twelve months after date (or before if made out of the sale of W. S. Coffman's improved broadcast seeding machine)", and it was held negotiable, the opinion of the court concluding, after reviewing the English and American decisions, as follows:

"The principle to be deduced from the authorities is this: To constitute a negotiable promissory note, the time or the event for its ultimate payment must be fixed and certain; yet it may be made subject to contingencies, upon the happening of which, prior to the time of its absolute payment, it shall become due. The contingency depends upon some

act done or omitted to be done by the maker, or upon the occurrence of some event indicated in the note; and not upon any act of the payee or holder, whereby the note may become due at an earlier day. Hence it is not in conflict with the decision of this court, which declared that if the instrument contained a power under which the payee might enter judgment upon it, its negotiable character was thereby destroyed. We think the learned judge was correct in holding this note to be negotiable."

Decided, 1873.

This case cites at length and relies on 19 Ohio St., 586; 7 Metc., 588, and 12 M. and W., 139.

In *Cisne v. Chidester*, 85 Ills., 523, the supreme court of Illinois considered a note of $120, payable on the first day of September, 1871 (or before, if made out of the sale of J. B. Drake's horse hay fork and hay carrier,)" and the court in a brief opinion held the note negotiable and that the consideration could not be inquired into on suit by an innocent purchaser, citing and following the above case in the 74 Pa. St.

In *Cota v. Buck*, 7 Metc., 588. A note as follows was held negotiable: "New Ashford, March 13, 1840. For value received, I promise to pay John Pero or bearer $575.50, it being for property I purchased of him in values at this date, as being payable as soon as can be realized of the above amount for the said property I have this day purchased of said Pero, which is to be paid in the course of the season now coming."

The opinion of the court per SHAW, C. J., is short and as follows:

"The true test of the negotiability of a note seems to be, whether the undertaking of the promisor is to pay the amount at all events, *at some time which must certainly come*, and not out of a particular fund or upon a contingent event. If it were payable on a contingency or out of a particular fund, it would not be negotiable. This note, we think, was payable by the promisor at all events, and within

a certain limited time. The note is obscurely written and ungrammatical. But we think the meaning was this: that the signer, for value received in the purchase of property, promised to pay Pero or bearer, the sum named, as soon as the termination of the coming season, and sooner, if the amount could be realized out of the fund. Such reference to the sale of the property was not to fix the fund from which it was to be paid, but the time of payment. The undertaking to pay was absolute and did not depend on the fund. So as to the time, whatever time may be understood as the "coming season," whether harvest time or the end of the year, it must come by mere lapse of time, and that must be the ultimate limit of the time of payment, exceptions overruled."

In *Dobbins v. Oberman*, 17 Neb., 163; decided 1885.

A note in ordinary form made payable to Anna M. Wilson, "on March 1, 1883, to which was added "This note shall become due immediately upon Anna M. Wilson delivering possession to me of certain described lands was held negotiable, the court page 165 observing "It is not urged by appellee in this court that the note is not negotiable in form. But it having been urged in the court below, and a considerable part of the appellant's brief being devoted to that point, it is but fair to say that the note as to form, no doubt complies with all the essential requisites of a negotiable promissory note. "An open promise in writing by one person to pay another person therein named or to his order or to bearer, a specified sum of money absolutely and at all events. "1 Dan. Neg. Inst., § 28. *It matters not, then, that it also contains a promise to pay sooner than the general date of payment*, upon the happening of an uncertain event."

In *Newton Wagon Co. v. Diers*, 10 Nebraska, 284, the same court held a note payable "on or before the first day of April, 1874," but which contained a condition "that a removal on the part of the undersigned from the county aforesaid, will render this note due and collectible by suit" to be negotiable.

In *Walker v. Woolen*, 54 Indiana, 164: A note payable "six months after date, or sooner if made out of the sale of Drake's Horse Hay Fork and Hay Carrier," was held negotiable, the court following and citing 74 Pa. St., 13, and *Cota v. Buck, supra.*

And in *Woolen v. Ulrich*, 64 Ind., 120, the same court held to this ruling on a similar note, saying, p. 123: "A note similar to the one in suit was held by this court in the case of *Cornell v. Nebecker*, 58 Ind., 425, to be a negotiable note, and we think the decision in that case is well sustained by the authorities upon which it is based."

A similar note given with the same identical condition was held negotiable in *Charlton v. Reed*, 61 Iowa, 166, the court citing and following the earlier Pennsylvania, Indiana and Massachusetts cases cited *supra.*

A note to be paid as soon and as fast as it may or can be collected on a certain contract, and if not so collected to be paid in four years, was held negotiable in *Smith v. Ellis*, 29 Me., 422.

9.

A stipulation in the notes in suit that default in the payment of any one of the series shall render all due is very like the usual stipulation in notes payable in installments that a failure to pay an installment when due shall render the whole amount due and payable, but this does not destroy the negotiability of a note.

1st Randolph on Commercial Paper, Sec. 114.

Citing:

Carlon v. Kenealy, 12 M. & W., 139.

Cooke v. Horn, 27 L. T. (N. S.), 369.

In *Oridge v. Sherborne*, 11 M. & W., 374, in default on a note payable in installments the endorser was sued and it was objected that the instrument was not negotiable.

Park, B., said that no case had been cited against holding it a negotiable instrument and that speaking from modern experience "(and mine in this respect has been of some standing) that he had no doubt numerous actions had been brought on such notes and it was now too late to claim that they were not maintainable."

Alderson and Rolfe agreed with him, and, speaking of their own full knowledge, declared that such instruments had always been and should be within the protection of the rules applicable to commercial paper.

In *Carlon v. Kenealy*, 12 M. & W., 139, in a suit on a promissory note, payable in installments, the whole to become due on default in any such payment, it was objected that the instrument was not negotiable. It was argued that it rendered the contract uncertain, at least as to the endorser, but Lord Abinger and Barons Park, Gurnee and Rolfe (the whole court) were plainly of the other opinion, the first two denying the propositions of counsel in an animated dialogue, and Park, B., declaring at the close:

"Now to hold that actions could not be maintained upon such notes as this would be to impugn all the established practice. Almost every note payable by installments has such a condition. It is not a contingency. It depends on the act of the maker himself, and on his default it becomes a promissory note for the whole amount. The point was in effect, determined in *Oridge v. Sherborne*."

In *Cooke v. Horn*, 29 Law Times Reports, 369, decided by the court of Queen's Bench, 1873, the note sued on was as follows:

£170. 25 April, 1872.

"We promise to pay Messrs. M. H. Cooke & Company £170 with interest thereon at the rate of five pounds per cent. per annum as follows: The first payment, to wit: forty pounds or more to be made of the 1st of February,

1873, and five pounds on the first day of each month following until this note and interest shall be fully satisfied. And in case default shall be made in payment of any of the said installments, the full amount then remaining due in respect of the said note and interest shall be forthwith payable."

It was argued among other things that the period of payment was indefinite, and a case was cited that a note payable so many days after marriage was too indefinite for commercial paper.

BLACKBURN, J., replied:

"This is only when the event may never happen. If the period of payment be inevitable, as upon death, it need not be definite."

And the same eminent judge delivered the opinion of the court as follows:

"The objection to the note is that if the first payment were more than forty pounds, which the note provides it might be, the subsequent installments and the final time of payment would be indefinite. The amount of the note however, is certain, and any variation in the time will depend only upon the defendant. No case has been cited which is an authority against this note; and by analogy with other objections this one, as it seems to me, ought not to prevail. I do not see why a stipulation which enables the maker of a note to reduce his liability for interest should prevent the instrument containing it from being a promissory note."

It will be observed that this decision was rendered twenty-two years after the, perhaps, *obiter* remarks of Lord Campbell in *Alexander v. Thomas*, so much relied on by counsel for plaintiff in error and that this later case fully sustains the doctrine of

Andrews v. Franklin, 1 Str., 24,

Colehan v. Cooke, Willes, 393,

the earlier English decisions which it is claimed Lord Campbell discredited.

In *Sea v. Glover*, 1 Bradwell (Ills.), 335, it was held that a note with COUPONS FOR INTEREST attached containing a clause that on default in payment of interest the whole amount should become due, at the option of the holder thereof, was still a promissory note and governed by the rules of law applicable to such obligations.

Yet it must be remembered that these *coupons* were as much separate and distinct instruments as the separate notes making up the series referred to in the obligations sued on herein.

If the provision that default on any of the series of notes makes the rest due, destroys the negotiability of the notes, then since such a condition is almost universally inserted in mortgages or trust deeds given to secure a series of notes or negotiable bonds, and since a note or bond and the contemporaneous mortgage or deed securing it are to be construed together as one instrument, all this great line of securities, than which none is in practice more extensively negotiated, is without the law merchant and non-negotiable.

In *Noell v. Gaines*, 68 Mo., 649, where two notes were secured by trust deed with such a provision in the deed, the plaintiff owning both notes, in default on the first, caused a sale to be made of the security. The proceeds not being enough to pay both notes, when the day fixed on its face for the payment of the second note arrived, plaintiff demanded payment, and on refusal gave notice of dishonor to the endorser. In an action on the note held as the second note became due and payable on the first default and the election of plaintiff to act thereon, that the notice was too late; p. 654, the court says: "Counsel for plaintiff, however, attempt to draw a distinction as to that case (*Witcher v. Webb*, 44 Cal., 127), by saying that there the provision relied on was in the body of the note. But what of that? If it be true where one instrument refers to another, contemporaneously executed, relating to, and forming part and parcel of, the same transaction, that there, both instru-

ments become one in the eye of the law, it must incontestibly follow that it makes no sort of difference in which instrument the proviso be contained."

10.

The fact that the time when the note will fall due can not be ascertained beforehand, in no way affects its negotiability, so long as the time is certain to arrive. Thus, notes are negotiable if payable within a fixed number of days after the death of a person named, whether he be a party to the instrument or not, because that time must come.

Randolph on Com. Paper, § 113.
Story on Neg. Inst., § 27 and many cases cited.
Cooke v. Horn, 29 Law Times, R. 369.
Bristol v. Warner, 19 Conn., 7.

The syllabus in the last above case is as follows:

"Where A. made and signed a writing in these words, 'On demand, after my decease, I promise to pay B. or order, $850 without interest,' which was delivered to B. as evidence of A.'s indebtedness to him, it was held that this instrument was not of a testamentary character to be proceeded with in the probate court, but was a promissory note negotiable and irrevocable."

See also

Conn. v. Thornton, 46 Ala., 587.

This was a suit on a note payable "one day after date," "or at my death."

The opinion of the court is short and we quote it in full. "Of the essential elements of a promissory note, one is cer-"tainty as to the time of payment. Here the rule that what

"can be made certain is certain, is permitted to operate. A "note payable within a limited time after a man's death is "sufficiently certain as to the time of payment, because an "event must occur which will make this definite.

"1 Pars. on Notes and Bills, pp. 40, 38, 39.

"A written promise to pay a certain sum of money at the "death of a party to the instrument, or at a limited time "after the death of such a party, or of a third person, is a "valid promissory note; because it must inevitably become "due at some future time, since all men must die, although "the exact period is uncertain.

"Story on Prom. Notes, sec. 27."

Yet when it is considered that death may come to the person named at any moment, and in any part of the earth, on land or the high sea, it is plain that the difficulty of ascertaining the fact promptly, for the purpose of "fixing" an endorser, would be far greater than in instruments like the present. In either case, the reasonable rule would require such notice to be given whenever the holder had, or with proper diligence might have, notice of the death or default.

11.

The modern rule, whatever may have been the older rule, is that provisions added to an agreement, otherwise a negotiable note, which are merely to facilitate its collection in case of default by the maker, in no way impair the negotiability of the instrument. So a stipulation for attorney's fees in case of collection of the note by action has been held repeatedly, and especially in the federal courts, not to affect

the negotiability of the instrument. It "is, strictly and properly speaking, no part of the note, but a distinct contract collateral thereto, as much as if it was written on a separate piece of paper."

Wilson Sewing Machine Company v. Moreno, 6 Saw. Rep., 35–40.

Bank of British North America v. Ellis, 6 Saw., 96.

Howenstein v. Barnes, 5 Dill., 482.

Adams v. Addington, 16 Fed. Rep., 89.

American Mortgage Co. v. Downing, 17 Fed. Rep., 660.

And in the latter case the opinion was by Mr. Justice MILLER of this court.

This is also the law of Illinois where the notes in suit were dated, were payable and were negotiated.

Nickerson v. Sheldon, 33 Ill., 372.

So a note promising to pay money on a day certain with interest at a named rate and all costs and ten per cent. attorney's fees, was held negotiable.

Schlesinger v. Arline, 31 Fed. Rep., 648.

And see 1st Randolph on Commercial Paper, Sec. 205.

CONCLUSIONS.

We submit that the instruments in suit are in form commonly current and treated as negotiable instruments in all great commercial centers, and on the faith of which hundreds of thousands of dollars are transferred at all great banks during every year. That the agreement for the payment of money is clear, definite and certain as to the amount, and that the time of payment is fixed certainly at a given date and is only to be accelerated, if at all, by the default of the maker, and that whether or not the points involved in litigation are in some minor respects novel in the courts of last resort, yet, these instruments should be held negotiable, and the protection of the law merchant should be extended to them. The doctrine adopted by this court is one of great breadth and enlightenment in dealing with commercial paper which plays so important a part in the transactions of modern life. And we cannot do better than to quote the language of the court used in *Mercer County v. Hackett*, 1 Wallace, see page 95, where it was admirably said of certain securities not negotiable under the earlier decisions:

"But there is nothing immoral or contrary to good policy in making them negotiable if the necessities of commerce require that they should be so. A mere technical dogma of the courts or the common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usage of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone; and this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law."

These just observations were cited by the circuit court in *Howenstein v. Barnes*, 5 Dill., 482, as showing the spirit in which federal courts of inferior jurisdiction had been taught by this court to approach questions affecting the negotiability of commercial instruments, and were submitted by us upon the trial of this cause at the circuit court, and we trust that the reliance which the trial court placed upon them was not unwarranted.

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CHARLES NOBLE GREGORY,
Of Counsel.

Office Supreme Court U. S.
FILED
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

THE CHICAGO RAILWAY EQUIPMENT COMPANY,
Plaintiff in Error,

vs.

THE MERCHANTS NATIONAL BANK OF CHICAGO,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JOHN P. WILSON,
ATTORNEY FOR DEFENDANT IN ERROR.

BARNARD & GUNTHORP, LAW PRINTERS, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1889.

THE CHICAGO RAILWAY EQUIPMENT COMPANY,
Plaintiff in Error,

vs.

THE MERCHANTS NATIONAL BANK OF CHICAGO,
Defendant in Error.

Brief for Defendant in Error.

The record in this case presents but a single question viz: whether the instruments upon which the judgment sought to be reversed was rendered are negotiable promissory notes. Plaintiff in error alleges that the instruments in question lack the essential elements of negotiable paper in this: first, that the time of payment is uncertain and contingent; second, that they are not absolute obligations to pay, but are contracts for the conditional sale of personal property. Defeudant in error denies both of these propositions.

I.

THE NOTES IN QUESTION ARE PAYABLE AT A TIME WHICH MUST CERTAINLY ARRIVE, AND THEREFORE THE PROMISE TO PAY IS NOT MADE CONTINGENT OR CONDITIONAL BY REASON OF ANY UNCERTAINTY AS TO THE TIME OF PAYMENT.

The first part of the instrument sued on is in the usual form of a promissory note, and the uncertainty, if any, as to date of payment arises out of the following clause:

"This note is one of a series of twenty-five notes of "even date herewith, of the sum of five thousand dollars "each, and shall become due and payable to the holder "on the failure of the maker to pay the principal or in- "terest of any one of said series."

As appears from the further recitals in the note the payment thereof was secured by certain cars therein described, for the payment of which the series of notes was given. The clause above quoted was evidently inserted for the benefit of the holder of the note. It is customary where an indebtedness is secured by a mortgage or otherwise to provide that upon default in the payment of interest or any part of the principal all the debt shall mature. This provision had its origin in the difficulty experienced in foreclosing a mortgage or other lien where only a part of the debt secured thereby was due or payable. It has for many years been a usual provision in all large transactions, and is inserted solely for the benefit of the payee and which it is his option to avail himself of or not as he may deem for his interest. The true construction of the provision is not that the note becomes due absolutely upon the happening of the contingency,

but that it becomes due at the option of the holder of the note. It has never been held in such a case that the debtor by making default in the payment of interest could acquire the right to pay off his entire debt against the wish of the owner of the indebtedness. To hold that the effect of this and similar provisions was to cause the debt to become absolutely due, against the wish of the creditor, would be to enable the debtor to take advantage of his own wrong and to convert a provision intended for the benefit and security of the creditor alone, into a means of destroying and defeating the contract between the parties. Provisions like the one in question have been in common use for many years, but no adjudicated case can be found where it has been held, either that the negotiability of the paper was thereby affected, or that the debtor by making default could thereby acquire the right to pay his debt before its maturity by lapse of time. But even if this clause in the note should be construed as making all the notes of the series absolutely due upon default in the payment of one, the negotiability of the note would not be affected thereby. The notes in question are dated and made payable at Chicago, in the State of Illinois, and were there assigned to defendant in error. It follows that the question of their negotiability is to be decided by the laws of the State of Illinois.

Brabston v. *Gibson*, 9 How., 263.
Musson v. *Lake*, 4 How., 262.
Supervisors v. *Galbraith*, 99 U. S., 214.

Promissory notes were not negotiable at common law, but are made so by the statute of the State of Illinois.

Newhope D. B. Co. v. *Perry*, 11 Ill., 467.
Lowe v. *Bliss*, 24 Ill., 168.

The negotiability of the paper in question depending upon the construction of a statute in the State of Illinois, is to be governed by the decisions of the supreme court of that state.

Burgess v. *Seligman*, 107 U. S., 20

Section three and four of chapter nine of the revised statutes of the state of Illinois are as follows:

"SEC. 3. All promissory notes, bonds, due-bills and "other instruments in writing, made or to be made, by "any person, body politic or corporate, whereby such per- "son promises or agrees to pay any sum of money or "article of personal property, or any sum of money in "personal property, or acknowledges any sum of money "or article of personal property to be due to any other "person, shall be taken to be due and payable, and the "sum of money or article of personal property therein "mentioned shall, by virtue thereof, be due and payable "as therein expressed."

"SEC. 4. Any such note, bond, bill, or other instru- "ment in writing, made payable to any person named as "payee therein, shall be assignable, by indorsement there- "on, under the hand of such person, and of his assignees, "in the same manner as bills of exchange are, so as ab- "solutely to transfer and vest the property thereof in each "and every assignee successively."

It is contended by counsel for plaintiff in error that the effect of the statute as to paper not negotiable at common law, is only to vest the legal title in the assignee and not to make such paper negotiable in a commercial sense as to protect an assignee before maturity against equities in favor of the maker. But the Supreme court of the state of Illinois has expressly decided otherwise, and its decision upon the construction and effect of the statute is

controlling. In *Stewart* v. *Smith*, 28, Ill., 397, the court had occasion to pass upon an instrument in the following form:

"CHICAGO, 21st January, 1859.

"Received from teams in our pork house, No. 114 "West Harrison street, 280 hogs, weighing 45,545 pounds, "the product of which we promise to deliver to the "order of Messrs. Stevens and Brother, indorsed hereon.

"G. & J. STEWART."

The court in rendering its decision by Breese, J. say:

"Testing the writing by this statute, there cannot be a "doubt upon its assignability. It is an instrument in "writing—it purports to be made by persons—by it, those "persons promise and agree to deliver a certain article of "personal property, to the order of certain other persons. "By force of the statute, this article of personal property "mentioned in the instrument of writing so made, by "virtue of its being so mentioned, and in such form of "words, must be taken to be due and payable to the per- "sons to whom the instrument in writing is made.

"The statute does not require that the note or instru- "ment in writing shall be payable at any particular time "or place, or be expressed for value received, or that any "consideration whatever should appear in the writings— "an acknowledgment of indebtedness, in the simplest "form would seem to be all the statute requires to give it "the character of negotiability. A writing in this form, "probably the simplest, would be a perfect negotiable note "under this statute: Due John Brown, ten dollars, July "4, 1862, and signed by the maker. Such an instrument "is clothed with all the attributes of negotiability, and im- "ports a consideration, and no averments or proofs are "necessary on those points. * * *

"The other point made by plaintiffs that the instru-
"ment was over-due on the 26th of January, 1859, when
"it was indorsed, to such an extent as to put a prudent
"man upon inquiry in respect to all the equities which the
"makers might have against it in the hands of the
"promisee, we do not consider a strong one." * * *

"The indorsement being in season cut off all equities
"if there were any, in defendant's favor, and the only
"hazard incurred in holding it back for payment, was
"that the release of the indorsers might have been caused
"by it, but not the release of the maker."

The same construction was given to the statute in the case of *Bilderback* v. *Burlingame*, 27 Ill., 338. The construction of this statute as laid down in these cases has never since been questioned in the state of Illinois. Promissory notes are nogotiable in Illinois by virtue of the state statute. What are the essential requisites of an instrument to make it a negotiable note within the meaning of the statute depends upon the construction given to the statute, and is therefore a question upon which the decision of the State Supreme court should control. The Supreme court of the State of Illinois has decided what certainty in regard to the time of payment is essential to a negotiable promissory note. In the case of *Canadian Bank* v. *McCrea*, 106 Ill., 29?, the court, after reviewing the cases in Illinois, say:

"They render it clear that the promise or under-
"taking must be restricted to the payment of money
"or delivery of property at a time that will certainly hap-
"pen. *It may be unknown in advance, when it will be,*
"but it must be absolutely certain that it will be some-
"time."

In the case of *White* v. *Smith*, 77 Ill., 351, the court say:

"The principle is undoubted that to constitute a valid "promissory note it must be for the payment of money, "which will certainly become due and payable one time "or other, *though it may be uncertain when that time will "come.*"

In the case of *McCarty* v. *Howe*, 24 Ill., 342, suit was brought upon a note in the following form:

"AURORA, August 26, 1858.

"Four months after date, or as soon as I shall be able "to collect a certain note against Abram Davis, of Chi- "cago, for value received, I promise to pay G. Mar- "lette, or bearer, one hundred and twenty-five dollars "with use."

The court held that this note was an absolute promise on the part of the maker to pay the amount named four months after date, but "that it was in the power of "the payee, if he could prove the Davis note was paid "before the four months was expired, to have demanded "payment on that event," and that it was therefore, a negotiable promissory note. To the same effect is *Harlow* v. *Boswell*, 15 Ill., 56, in which case suit was brought by an assignee and the maker plead failure of consideration. The court held that the defense could not be interposed because the note was in the hands of a bona fide assignee before maturity. The note in that case read as follows:

"Twelve months after date, for value received, I prom- "ise to pay G. W. Allen or W. H. Reed, his agent, fifty "dollars, or as soon as I can sell the above amount of "Allen's Vegetable Tonic.

"Witness my hand and seal October 7, 1847."

In the case of *Cisne* v. *Chidester*, 85 Ill., 523, the action was brought by the assignee of a promissory note in the following form:

"$120.00. May 2d, 1871.

"On the first day of September, 1871, or before, if "made out of the sale of J. B. Drake's horse hay fork "and hay carrier, I promise to pay James B. Drake or "order one hundred and twenty dollars for value received "with use."

The maker plead that the note was given without consideration. The court held that the defense was inadmissible, as the plaintiff was a bona fide indorsee of the note for a valuable consideration before maturity.

A promissory note is sufficiently certain as to time of payment to make it negotiable under the statute of Illinois where the time of payment will certainly arrive, although it may be uncertain when that time will come. It is clear that the time of payment of the instruments in this case would arrive in four months from their date in any event; they were therefore negotiable notes under the statute and decisions of the State of Illinois, so far as the time of payment is concerned. The uncertainty as to the time of payment did not render the note contingent.

But even if the question of negotiability as to time of payment was not to be controlled by the statute and decisions of the State of Illinois, no defense would exist on that ground. The authorities holding that uncertainty as to the date of payment which does not render the payment contingent does not destroy the negotiability of a promissory note, are numerous and well considered. That a note is negotiable if payable certainly at a fixed time,

although subject to a contingency by which it may become due earlier, has been decided in the following cases:

Ernst v. *Steckman*, 74 Pa. St., 13.
Cota v. *Buck*, 7 Metc., 588.
Walker v. *Woolen*, 54 Ind., 164.
Woolen v. *Ulrich*, 64 Ind., 120.
Charlton v. *Reed*, 61 Iowa, 166.

That a note payable on or before a fixed date is negotiable, has been decided in the following cases:

Jordon v. *Tate*, 19 Ohio St., 586.
Matson v. *Marks*, 31 Mich., 421.
Riker v. *Sprague Mfg. Co.*, 14 R. I., 402.
Curtis v. *Horne*, 58 N. H., 504.
Ackley School District v. *Hall*, 113 U. S., 135.

That a provision in a note payable in instalments that a failure to pay an instalment shall render the whole amount due and payable, does not destroy the negotiabilty of the note, was decided in—

Carlin v. *Kenealy*, 12 M. & W., 139.
Cook v. *Horne*, 29 Law Times Rep., 339.
Andrews v. *Franklin*, 1 Str., 124.
Colehan v. *Cooke*, Willes, 393.

To the same effect is *Sea* v. *Glover*, 1st Brad. (Ill.), 335.

Story on Promissory Notes, Sec. 27, states the law upon this point as follows:

"A written promise to pay a certain sum of money at "the death of a party to the instrument, or at a limited "time after the death of such a party, or of a third per-"son, is a valid promissory note, because it must inevit-

"ably become due at some time, since all men must "die although the exact period is uncertain."

As against these decisions counsel for plaintiff in error relies upon a dissenting opinion of Lord Campbell in *Alexander* v. *Thomas*, 16 Q. B., 83, decided in 1851, and which is not and never has been the law in England.

This dissenting opinion related to a bill of exchange and not to a promissory note, which is controlled by statute, and was to the effect that the bill in question was not drawn according to the custom of merchants. He also relies upon the decisions in the State of Massachusetts. These decisions are to the effect that a note payable on or before a given date is not negotiable. In this respect the decisions of Massachusetts are in conflict with the decisions of this court, and the whole current of authority in the United States, and the last case decided in Massachusetts on this subject was by a divided court.

Counsel for plaintiff in error tries to impair the weight of the cases cited for defendant in error, upon the ground that they are not well considered, and are based upon authorities that have been overruled. An examination of the cases will not sustain this statement. The Massachusetts decisions relied upon by the plaintiff in error have been carefully considered by the courts of other states and disapproved of. The case of *Ricker* v. *Sprague Manfg. Co.*, 14 R. I., 402, decided in 1885, contains a full review and consideration of all the authorities. The court say:

"We think the rule of law is clearly this, namely, that "if the time of payment named in the note must certainly "come, although the precise date may not be specified "therein, it is sufficiently certain as to time."

In *Curtis* v. *Horne*, 58 N. H., 504, decided in 1878, the court say:

"It is now the common law that where the payment is "made to depend upon an event that is certain to come, "but uncertain only in regard to when it will take place, "the note or bill is negotiable."

Citing many cases, and expressly dissenting from the Massachusetts decisions.

A consideration of all the decisions cited by the plaintiff in error from Massachusetts does not seem to entitle them to much weight as authority on the question now before this court. In the case of *Cota* v. *Buck*, 7 Metc., 588, the note sued upon was in the following form:

"NEW ASHFORD, March 13, 1840.

"For value received I promise to pay John Pero, or "bearer, five hundred and seventy dollars and fifty cents, "it being for property I purchased of him in value at this "date, as being payable as soon as can be realized of the "above amount for the said property I have this day pur- "chased of said Pero, which is to be paid in the course "of the season now coming."

It was objected that the instrument was not a negotiable note. Chief Justice SHAW, rendering the opinion of the court, says:

"The true test of the negotiability of a note seems to "be, whether the undertaking of the promissor is to pay "the amount at all events, at some time which must cer- "tainly come, and not out of a particular fund or upon a "contingent event. If it were payable upon a contin- "gency, or out of a particular fund, it would not be nego- "tiable. This note, we think, was payable by the promis- "or at all events, and within a certain limited time

"The note is obscurely written and ungrammatical. But "we think the meaning was this: That the signer, for "value received in the purchase of property, promised to "pay Pero or bearer the sum named, as soon as the ter- "mination of the coming season, and sooner, if the amount "could be sooner realized out of the fund. Such refer- "ence to the sale of the property was not to fix the fund "from which it was to be paid, but the time of payment. "The undertaking to pay was absolute, and did not de- "pend on the fund. So as to the time, whatever time "may be understood as the 'coming season,' whether "harvest time or the end of the year, it must come by "the mere lapse of time, and that must be the ultimate "limit of the time of payment."

The next case cited is *Hubbard* v. *Mosely*, 11 Gray, 170. The instrument sued on was in the following form:

"500. Ninety days after date, for value received, I "promise to pay J. H. & Wm. L. Mills or order, five "hundred dollars. This note is on the condition that as "soon as the amount of five hundred dollars is received "by the said J. H. & Wm. L. Mills, then this note is to "be given up to the said Edmund Hubbard. Chester, "March 5, 1855."

Suit was brought by an assignee and it was contended that the instrument was not a negotiable note. The court say:

"The paper writing set out in the declaration is not a "negotiable promissory note, on which an action can be "maintained by a person other than the one to whom it is "made payable. It is a contract to pay a sum of money "on a condition, and not a promise to pay it to the payee "or holder absolutely and at all events. The defendants'

"intestate by the terms of the note had a right to pay it "in full, at any time before its maturity, to the persons to "whom it was made payable. Such payment to them "would have been a good discharge of the contract, al- "though it had then been passed over to a third person "if the promissor had no notice of such transfer. The "stipulation or condition therefore was inconsistent with "its unlimited negotiability, and takes away from "the contract the essential feature of a promissory note."

The case of *Cota* v *Buck* was not cited by counsel or referred to by the court in the case of *Hubbard* v. *Mosley*, and the two decisions are entirely consistent. The decision in the case of *Hubbard* v. *Mosley* is expressly based upon the ground that the instrument sued on was a contract to pay a sum of money on a condition and not a promise to pay it to the payee or holder absolutely. Under this construction of the instrument the decision was clearly right and in accord with the principles laid down in *Cota* v. *Buck*.

The case of *Way* v. *Smith*, 111 Mass., 523, arose upon a note containing the following provision:

"It is agreed that this note may be paid at any time "before maturity and that interest at the rate of eighteen "per cent. per annum shall be deducted till due."

The court say:

"This stipulation gives the maker the right to pay the "note at any time before its maturity at his option, and "such payment would discharge his contract. It renders "the contract uncertain and contingent, both as to the "time of payment and the amount to be paid, and is in- "consistent with the essential character of a negotiable "promissory note. The case of *Hubbard* v. *Mosley*, 11 "Gray, 170, is decisive of this case."

It will be observed that the amount to be paid depended upon the date of the payment, which was optional with the maker, and therefore the amount to be paid was uncertain and the case of *Hubbard* v. *Mosley*, 11 Gray, 170, was treated as decisive. The case of *Cota* v. *Buck*, *supra* was not referred to by the court in its opinion.

In the case of *Stults* v. *Silva*, 119 Mass., 137, arose upon a note payable in a year and a half from its date, or sooner, at the opinion of the mortgageor. The court say:

"Each of the instruments in suit expresses a promise "to pay a certain sum of money in a year and a half from "its date, 'or sooner at the option of the mortgagor' with "interest at a certain rate 'during said term.' The prin- "cipal sum is to be paid either at the time specified, or at "any earlier time that the mortgagor may elect. The "interest is to be computed only until the note is paid. "Both the time of payment of the principal, and the "amount of interest, are uncertain, and depend upon the "election of the mortgagor, who would seem, from the "memorandum upon the note itself, to be the maker of "the note. But if he were a third person it would not "aid the plaintiff. In either alternative the contract, not "being a promise to pay a fixed sum of money at a defi- "nite time, lacks the essential quality of a negotiable note "and cannot be sued upon as such.

"*Way* v. *Smith*, 11 Mass., 523.
"*Hubbard* v. *Mosely*, 11 Gray, 170.
"Story on Notes, Sec. 22."

This decision would seem to rest chiefly upon the uncertainty as to the amount of interest which would accrue prior to the date of payment. No reference was made to the case of *Cota* v. *Buck*.

In the case *Mahoney* v. *Fitzpatrick*, 133 Mass., 151, the suit was brought upon a promissory note payable "on "demand, or in three years from this date," with interest at 6 per cent. "during said term or for such further time "as said principal sum or any part thereof shall remain "unpaid." The court said after discussing the instrument:

"A note payable at a future day certain or earlier, at "the option of the maker or of a stranger, is not payable "at a time certain and is not negotiable.

"*Way* v. *Smith*, 111 Mass., 523.

"*Stultz* v. *Silva*, 119 Mass., 137.

"The case at bar comes within the principal of these "decisions."

* * * * *

"In *Cota* v. *Buck*, 7 Metc., 588, the precise question "presented in the case at bar does not seem to have been "raised or considered by the court. In the opinion of a "majority of the court the instrument declared upon is not "a negotiable promissory note."

The most that can be said of the Massachusetts cases is that they establish the propositions that an instrument payable at the option of the maker prior to its maturity is not a negotiable instrument and that this view at the date of its last decision upon the subject was only concurred in by a majority of the judges of the Supreme court of Massachusetts. The question so decided in Massachusetts is not an open one in this court. The contrary doctrine was adopted by this court in the cases of *Ackley School District* v. *Hall*, 113 U. S., 135, and *Morgan* v. *United States*, 113 U. S., 476. See also the opinion of Judge Cooley in *Matteson* v. *Marks*, 31 Mich., 431, where the court refused to follow the case of *Hubbard* v. *Mosely*, *supra*.

II.

THE INSTRUMENTS IN QUESTION WERE ABSOLUTE PROMISES TO PAY THE AMOUNTS MENTIONED THEREIN, AND NOT MERELY EXECUTORY AGREEMENTS FOR THE SALE OF PERSONAL PROPERTY.

It is contended on behalf of plaintiff in error that the instruments in question were mere executory agreements evidencing the terms and conditions of a conditional sale of personal property, and not absolute promises to pay the amounts therein specified. Under this branch of the case the sole question is whether the obligation to pay on the part of the maker is modified or made conditional by the agreement added to the note. If the sole object and effect of the clause added to the notes was to secure the performance on the part of the maker of his promise to pay, and not to qualify or limit that promise, then obligation to pay is not conditional and the notes were negotiable.

The clause added to the note is as follows:

"This note is one of a series of twenty-five notes of "even date herewith of the sum of five thousand dollars "each, and shall become due and payable *to the holder* on "the failure of the maker to pay the principal or interest "of any one of said series, and all of said notes are given "for the purchase price of two hundred and fifty railway "freight cars manufactured by the payee thereof and "SOLD by said payee to the maker hereof, which cars "are numbered from 13,000 to 13,249 inclusive, and "marked on the side thereof with the words and letters "'Blue Line, C. & I. R. R. Co.,' and it is agreed by the "makers hereof that the title to said cars shall remain in

" said payee until all the notes of said series, with princi-
" pal and interest, are fully paid, *all of said notes being*
"*equally, rateably secured on said cars.*"

It will be observed that the note is payable to the order of the payee; that it is provided that the note upon default in the payment of any one of the series shall become due and payable *to the holder*; that the agreement about the title to the cars is made by and on behalf of the maker and not the payee of the note; that the title to the cars is to remain in the payee, and that all the notes are to be equally and rateably *secured* on said cars. It is evident from the entire instrument that it was drawn for the purpose of being negotiable and passing into third hands; hence the provision that all the notes shall be equally, rateably secured, as otherwise the holder of the note first maturing might have a preference in payment out of the security over the holders of the other notes. This provision in regard to rateable security would be wholly useless so long as all of the notes remained the property of the payee. It was clearly the intention of the parties by this provision inserted in the note to place all parties including the assignees of the notes, in the same position which they would occupy if a chattel mortgage had been given by the maker of the note to the payee. It seems too plain for serious doubt or discussion that this clause was added to the note for the sole purpose of securing the payment of the note and the performance by the maker of his promise to pay and not to qualify, modify or limit the obligation to pay in any manner whatsoever. The payee promises nothing. There is no agreement on his part to do anything whatsoever. The notes having been clearly made for the purpose of being placed on the market and passing into

third parties' hands, it could not have been the intention of the parties that the right of these third parties to receive payment should be dependent upon anything to be done by the payee. Such a construction would have placed an absolute veto upon the sale of the notes or their assignment in the usual course of business. If the real contract between the parties had been a mere executory agreement for the sale of the property described with a conditional promise to pay upon delivery of the title at some future time an instrument in some other form would certainly have been drawn. Some agreement would have been inserted on the part of the payee with reference to what was to be done on his part. The recital in the note is that the property described has been SOLD by the payee, to the maker, not that he agrees to sell at some future time. The agreement in regard to the title is made by the purchaser because he has bought the property. If the instrument was an agreement for a future sale there would be no occasion for any agreement on the part of the vendee about the title or about the notes being secured on the cars. The owner of personal property contracting for its future sale has the title, and needs no agreement for security on the property until the sale is completed. The very fact that the purchaser stipulates and agrees in regard to the title and in regard to security on the property implies a complete sale, and that he by his agreement is giving to the vendor something which he would not otherwise have. The fact that the title is to remain in the vendor until the notes given for the purchase money are paid, does not necessarily convert the transaction into a conditional sale. The question as to whether the transaction is a conditional sale or an absolute sale with security for the payment of

the purchase price depends upon the intention of the parties as gathered from the entire instrument.

In the case of *Heryford* v. *Davis*, 102 U. S., 235, it appears that a car company had furnished certain cars to a railway company, taking the notes of the railway company for the purchase price, and at the same time entering into a written agreement, signed by both parties, which, among other provisions, provided that the cars should remain the property of the car company until the notes were paid, and that until such payment the railway company should have no right, title, claim or interest in or to the said cars, except as to their use or hire. This court in deciding the case said:

"The correct determination of this case depends altogether upon the construction that must be given to the "contract between the Jackson & Sharp Company and "the railroad company, against which the defendants below recovered their judgment and obtained their execution. If that contract was a mere lease of the cars to "the railroad company, or if it was only a conditional "sale, which did not pass the ownership until the condition should be performed, the property was not subject "to levy and sale under execution at the suit of the defendant against the company. But if, on the other "hand, the title passed by the contract, and what was "reserved by the Jackson & Sharp Company was a lien "or security for the payment of the price, or what is "called sometimes a mortgage back to the vendors, the "cars were subject to levy and sale as the property of the "railroad company.

* * * * *

"What, then, is the true construction of the contract?

"The answer to this question is not to be found in any "name which the parties may have given to the instru- "ment, and not alone in any particular provisions it con- "tains, disconnected from all others, but in the ruling "intention of the parties, gathered from all the language "they have used. It is the legal effect of the whole "which is to be sought for. The form of the instrument "is of little account."

* * * * *

"It is quite unmeaning for the parties to a contract to "say it shall not amount to a sale, when it contains every "element of a sale, and transmission of ownership. This "part of the contract is to be construed in connection "with the other provisions, so that if possible, or so far "as is possible, they all may harmonize. Thus construed, "it is quite plain these stipulations were inserted to "enable the manufacturing company to enforce "payment, not of any rent or hire, but of the "selling price of the cars for which the company "took the notes of the railroad company. They were in- "tended as additional security for the payment of the "debt the latter company assumed. This is shown most "clearly by the other provisions of the contract. The "notes became the absolute property of the vendors. As "has been stated they all fell due within four months, and "it was expected they would be paid. The vendors were "expressly allowed to collect them at their maturity, and "it was agreed that whatever sums should be collected "on account of them should be retained by the vendors "for their own use.

"No part of the money was to be returned to the rail- "road company in any event, not even if the cars should "be returned.

* * * * *

"What was this but treating the notes given for the "sum agreed to be the price of the cars as a debt abso- "lutely due to the vendors? What was it but treating "the cars as a security for the debt.

* * * * *

"In view of these provisions, we can come to no other "conclusion than that it was the intention of the parties, "manifested by the agreement, the ownership of the cars "should pass at once to the railroad company in consid- "eration of their becoming debtors for the price. Not- "withstanding the efforts to cover up the real nature of "the contract, its substance was an hypothecation of the "cars to secure a debt due to the vendors for the price "of a sale. *The railroad company was not accorded an "option to buy or not.* They were bound to pay the "price either by paying their notes or surrendering their "property to be sold in order to make payment. This "was in no sense a conditional sale. *This giving of "property as the security for the payment of a debt is the "very essence of a mortgage which has no existence in the "case of a conditional sale.*"

Tested by the rules laid down in the foregoing case it is clear that the case at bar was one of an absolute sale and security given for the payment of the purchase price.

But counsel for plaintiff in error relies with much confidence upon the case of *Harkness* v. *Russell*, 118 U. S., 663, where this court held the contract involved in that case to be a conditional sale. But in the latter case the agreement is clearly distinguishable from the instrument in the case at bar. The instrument provided: "The ex- "press condition of this transaction is such that the title, "ownership or possession of said engine and saw-mill

"does not pass from the said Russell & Company until this " note and interest shall have been paid in full," and Russell & Company were authorized to take possession of the property before the maturity of the note, and it was further provided that Russell & Company might either sell the property again without notice or they might keep the property indorsing its value on the obligation in suit. The court held:

" So far as words and the express intent of the parties " can go it is perfectly evident that it was not an absolute " sale, but only an agreement to sell upon condition that " the purchasers should pay their notes at maturity."

In the case at bar it was expressly provided that the notes should be *secured* upon the cars. In no event was the maker relieved from the obligation to pay the entire amount, nor did the payee have the right to take and keep the cars as his own property or to sell the same without notice to the maker of the note. This was held to be conclusive against the claim of a conditional sale in *Palmer* v. *Howard*, 72 Cal., 293. There is no conflict between the cases of *Heryford* v. *Davis*, *supra*, and *Harkness* v. *Russell*, *supra*. In both cases this court recognized the rule that the intention of the parties as gathered from the entire instrument is to control in determining whether a contract is a conditional sale or security for the payment of the purchase price. The instruments in question in this suit, taken as a whole, show an absolute obligation on the part of the maker to pay the purchase price with a provision added to secure the obligation so created. There is not a single provision in the contract inconsistent with this view, unless it be the provision that the title should remain in the payee. This provision was contained in the contract before this court in the case of *Hery-*

ford v. *Davis*, and was held not to be a controlling provision. Indeed it cannot be fairly said that such provision is inconsistent with the idea of an absolute sale and security for the purchase price. If the transaction had been evidenced by a note in the usual form, with a chattel mortgage to secure its payment, the title to the property purchased would have been conveyed by the chattel mortgage to the payee in the note, to be held by him until the notes thereby secured were paid. The agreement by the maker of the note that the title should remain in the payee until the notes were paid, it being expressly stated that the notes should be secured on the property, is clearly a short form of chattel mortgage. It is not seriously contended on behalf of plaintiff in error under the objection now being considered, that the notes were not negotiable if the obligation to pay was absolute and the agreement added was only to secure the performance of the contract. The whole contention is that the instrument only evidenced a conditional sale. The law seems well settled that a collateral contract added to a note to secure its payment does not impair its negotiability. The addition must qualify the promise to pay so as to render it conditional or the amount uncertain in order to destroy the negotiability of the note.

The Bank of Carrol v. *Taylor*, 67 Iowa, 572. The case of *Manufacturing Co.* v. *Bradley*, 105 U. S., 175, arose out of a suit upon a bond which contained an agreement making it a lien upon the property of the obligor and this court held it was a negotiable note within the meaning of the law merchant.

We do not understand plaintiff in error to contend that a collateral agreement in no wise modifying the certainty of the note, as to the time or obligation of payment

would destroy its negotiability. Such agreements in relation to attorneys' fees, confession of judgment and other like provisions, have frequently been before the courts, and it is well settled that they do not destroy the negotiability of the note containing them.

But even if the contract between the parties in this case should be construed to constitute a conditional sale, it was conditional only to the extent that plaintiff in error's title to the property was dependent upon his paying the notes. The right of possession was not retained in the payee. The contract was performed, so far as the seller was concerned, and was conditional only on the part of the maker of the notes. Nothing remained to be done but payment of the purchase price. Thereupon the title to the property would vest in the purchaser. The purchaser had no option not to take the property. His promise to pay was absolute and was not dependent upon anothing to be done by the maker. The notes given for the purchase price matured at different dates and by the express agreement of the maker was to be payable to the holders thereof and not to the payee. The true construction of these notes would not, in any event, make the obligation to pay conditional or dependent upon anything to be done by the payee.

Hawley v. *Bingham*, 6 Oregon, 76.
Sumner v. *Parker*, 36 N. H., 449.
Northrup v. *Northrup*, 6 Cowan, 296.

What seems to us the true construction of this contract was well stated by the district judge in deciding this case, as follows:

"The construction that I should place upon the pro-
"vision of the note, taken as a whole, is, that it is

"a recital of the consideration for which the note was "given, and of the fact that the payee was to retain "a lien by way of mortgage upon the property sold, as "security for the payment of the notes, and this appar- "ently for the purpose of giving the notes, which were "intended to be put on the market, a more ready ac- "ceptance and circulation, and a better market value. "The inference that anyone contemplating a purchase of "the note would naturally and properly draw would, I "think, be that the freight-cars had already been sold by "payee to maker, and that payee was to retain a lien and "security upon them in the way of mortgage for the pay- "ment of the purchase price, which would enure equally "and rateably to all the holders of the notes, according to "their several amounts, without regard to the time when "such notes should fall due. If this be so, contract was "an executed one, the consideration for the notes had "atready passed, and the payment of the notes would not "be made to depend upon any condition whatsoever."

25 Federal Reporter, 809.

Respectfully submitted,

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